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In The

Supreme Court of the United States

October Term, 1997

THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, INC., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, INC., JOHN VANCE MOTORS, INC. and TROY WESTNIDGE, INC.,

Petitioners,

v.

SELF INSURERS' MANAGEMENT GROUP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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QUESTIONS PRESENTED

I. Did the Oklahoma Supreme Court err in holding that Petitioners' participation in unincorporated workers compensation group self insurance associations were not subject to the Federal Securities Act of 1933 because the McCarran-Ferguson Act preempted such coverage?

II. Did the Oklahoma Supreme Court's ruling that the protection of the Oklahoma Securities Act was not available to the Petitioners effect an impermissible retroactive application of 85 O.S. 1996 § 149.1.C., in violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

This is a Joint Petition for Writ of Certiorari under Rule 12.4, wherein two judgments are sought to be reviewed on a writ of certiorari to the same Court and involve identical or closely related questions. The Petitioners in this case are: The YWCA of Oklahoma City, Century Martial Arts Supply, Inc., E & H Transfer, Inc., City Glass Co., Flip's Wine Bar & Trattoria, Inc., Mangum Brick Company, Ronnie's Signs, Inc., Dalmarc Enterprises Incorporated, Barbara J. Wilson, Oklahoma Steel & Wire, Inc., C & H Power Line Construction, Inc., Chris Hunt Water Hauling, Inc., John Vance Motors, Inc., Troy Westnidge, Inc. and Colbert Nursing Home, Inc. The Respondents in this case are Self Insurers' Management Group and Oklahoma Employers' Safety Group, S.I.A. All parties before the Oklahoma Supreme Court are before this Court.

RULE 29.6 STATEMENT

As required by Rule 29.6 of this Court, none of the corporate joint petitioners have parent companies or non-wholly owned subsidiaries, except as follows:

A. Century Martial Arts Supply, Inc.'s parent is Century Incorporated.

B. Mangum Brick Company's parent is Jewett Scott Truck Lines, Inc.

C. Oklahoma Steel & Wire, Co., Inc. has one subsidiary, Cyclone Truck, Inc.

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

The YWCA of Oklahoma City ("YWCA"), Colbert Nursing Home, Inc. ("Colbert") and the other petitioners (collectively the "Petitioners") ask this Court for a writ of certiorari to review two companion decisions of the Oklahoma Supreme Court rendered July 8, 1997.

OPINIONS BELOW

The two companion opinions below of the Oklahoma Supreme Court are officially reported as *Self Insurers' Management Group v. YWCA of Oklahoma City, et al.*, 1997 OK 95, 954 P.2d 115, and *Oklahoma Employers' Safety Group S.I.A., v. Colbert Nursing Home, Inc.*, 1997 OK 94, 954 P.2d 120. These opinions have been reprinted in the Appendix at App. 1 and 15.

The Judgments of the District Court of Oklahoma County, State of Oklahoma, from which the Oklahoma Supreme Court appeal was taken, and the Order of the Supreme Court denying Petitioners' Petitions For Rehearing have not been reported. The District Court Judgments are reprinted in the Appendix at App. 25 and 31, and the Oklahoma Supreme Court Order denying both Petitions for Rehearing appear in the Appendix at App. 34.

JURISDICTION

The Oklahoma Supreme Court Opinions to be reviewed were entered July 8, 1997. (App. 1 and 15.) On

March 9, 1998 the Oklahoma Supreme Court denied the Petitioners' respective Petitions for Rehearing in one Order which appears at App. 34. Jurisdiction is provided under 28 U.S.C. § 1257(a), which confers on this Court jurisdiction to review on a writ of certiorari final judgments or decrees rendered by the highest court of a State in which a decision could be had, in this case the Oklahoma Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the following constitutional provisions and statutes which are fully reprinted in the Appendix: U.S. Const. amend. XIV, Section 1; 15 U.S.C. § 77e; 15 U.S.C. § 77l; 15 U.S.C. § 77j; 15 U.S.C. § 1012; 71 O.S. § 301; 71 O.S. § 408(a)(1) and (2)(A); 71 O.S. § 408(i); and 85 O.S. § 149.1.

STATEMENT OF THE CASE

This Joint Petition relates to purchase agreements constituting investments in workers' compensation group self-insurer associations. These associations (the "Respondents") are designed to provide participants, like the Petitioners, the opportunity to meet their state workers' compensation obligations to their own employees; and to also, through the pooling of their investment and liability with others (a) realize profit or (b) incur additional liability and loss. The issues involve the application of State and Federal Securities Laws to the agreements and the Oklahoma Supreme Court's retroactive application of a

new (as to Petitioner YWCA, post-District Court Judgment) statutory amendment removing these associations from the protection of state securities laws.

Factual Background

Both Self Insurer's Management Group ("SIMG") and Oklahoma Employers' Safety Group, S.I.A. ("OESG") are unincorporated group self-insurance associations. Such associations are a statutorily authorized alternative to fulfill workers' compensation insurance requirements for Oklahoma employers. 85 O.S. § 149.1. More than half the states permit formation of these group self-insurance associations. See *Larson's Workers' Compensation Law*, § 92.11.[1] One fundamental difference in these associations

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[1] The following states have adopted provisions allowing for "group" self insurance associations similar to Oklahoma, to wit:

1. Kentucky Human Labor and Human Rights Statute, § 342.342;
2. Nevada and Industry Relations Statute 616B.386;
3. Mississippi Workers' Compensation Statute, § 71-3-75;
4. Georgia Group Insurance Funds Regulation, § 120-2-34-9-150;
5. Maine Bureau of Insurance Rule, Chapter 250-III;
6. Missouri Division of Workers' Compensation Rules 8 C.S.R. 50-3-010;
7. Nebraska Workmen's Compensation Court Rules No. 48-145;
8. Connecticut Workmen's Compensation Code, § 31-328;

from the purchase of a straight, or regular workers' compensation policy is that ownership/shares of the association is vested in small businesses who are "members", and the association is managed by a board of directors and an elected "administrator". If properly managed, the association operates at a profit and pays dividends to the members. If the association operates at a loss, assessments or additional amounts may be billed to the members. A fundamental requirement of these associations is that each member must agree to be jointly and severally liable for the workers' compensation liabilities of every other member.

Management of the associations is composed of a Member Supervisory Board and officers *selected by the members* to hold and manage the assets; direct the affairs of the association; and assure that the association, through its members, is financially sound and able to meet its obligations under the Workers' Compensation Act.

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9. Arkansas Workers' Compensation Commission Rules and Regulations, Rule 5, part III;

10. Michigan Department of Labor Bureau of Disability Compensation, Rule 408.43(d) et seq., § 418.205.

In addition, the following states also have similar laws: California, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin.

It is undisputed that in connection with the offer and sale of interests in the Associations, (1) the Respondents used the mail, telephone, and other means of interstate commerce; (2) none of the securities offered to or purchased by the Petitioners were registered under the Oklahoma Securities Act or the Securities Act of 1933; (3) the Respondents made hundreds of sales of interests; and (4) the Respondents did not disclose even minimal financial information necessary for the Petitioners to make an informed decision to participate.

History Of The Litigation

In the District Court below the Respondents filed suit in Oklahoma County District Court (the Honorable Niles Jackson presiding in both actions) and claimed the Petitioners owed additional funds (Respondent SIMG claimed the YWCA Petitioners were jointly and severally liable for $2.5 million dollars of deficits of that association; and Respondent OESG claimed additional amounts due of $58,060.00 from Colbert, after executing on a deposit). The Joint Petitioners responded by claiming the membership participation agreements were obtained in violation of the Oklahoma Securities Act and the Securities Act of 1933, among other defenses. See Oklahoma Supreme Court Opinions at App. 5 and 18.

The Petitioners were granted summary judgment in the District Court on the basis (among others) that the interests purchased were unregistered securities for purposes of both the Oklahoma Securities Act and the Securities Act of 1933. Pertinent quotations from the Petitioners' Briefs raising the issues in this Joint Petition, and other

issues, are set out in the Appendix at App. 46-55 and App. 56-72. An amendment to 85 O.S. 1991, § 149.1 became effective on November 1, 1996, adding subsection C, declaring that workers' compensation group self-insurers shall not be subject to the Oklahoma Securities Act. This amendment occurred *after* District Court judgment in favor of the YWCA Petitioners in the SIMG action, and *after* Colbert filed its Counterclaim, but before judgment in the OESG action. App. 10 and 13, and 20, respectively.

Thereafter the Respondents appealed to the Oklahoma Supreme Court. The Oklahoma Supreme Court retained jurisdiction of the two appeals and treated them as companion cases. App. 3. Due to Oklahoma Supreme Court Rule 1.36(g), "accelerated procedure", the parties below were not allowed to file appellate briefs in the Oklahoma Supreme Court. On July 8, 1997, the Oklahoma Supreme Court reversed the trial court's grant of summary judgment in the companion appeals and determined that under the McCarran-Ferguson Act, Federal Securities Laws are pre-empted by state regulations governing the conduct of "an insurer". In holding that the Oklahoma Securities Act does not apply to group self-insurers' associations, the Court gave retroactive effect to the recent amendment to Section 149.1. The Oklahoma Supreme Court denied the Petitioners' respective Petitions for Rehearing on March 9, 1998. App. 34. Pertinent quotations from the Petitioners' Petitions for Rehearing addressing the issues in this Petition and other issues, are set out in the Appendix at App. 73 and 80.

This Joint Petition seeks review of the Oklahoma decisions because it allows states to place an overly broad

restriction on federal power and bar legitimate protection under the Securities Act of 1933 (15 U.S.C. § 77a. et seq.), by applying another federal statute, the McCarran-Ferguson Act (15 U.S.C. § 1012). The Oklahoma Supreme Court has effectively held that the individual states have *sole*, unrestricted power with respect to regulating all conduct of an insurer; and additionally, because retroactive application of 85 O.S. § 149.1.C. prevents the Petitioners from applying the protection of the Oklahoma Securities Act, the ruling has violated the due process rights of the Petitioners under the Fourteenth Amendment to the U.S. Constitution.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case for two reasons:

1. The Oklahoma Supreme Court has denied the Petitioners protection of federal securities laws on the sole basis that the McCarran-Ferguson Act "preempts" and displaces the provisions of federal securities laws regarding the issuance of ownership interests in an insurance company/association.

2. The Oklahoma Supreme Court has determined the Petitioners are not entitled to due process under the Fourteenth Amendment through retroactive application of a state law passed after the YWCA Petitioners won a favorable district court decision (and after Petitioner Colbert asserted a similar defense).

In so ruling, the Oklahoma Supreme Court "has decided an important question of federal law that has not been, but should be, settled by this Court"; and which "conflicts with relevant decisions of this Court".

PROPOSITION I: THE MCCARRAN-FERGUSON ACT SHOULD NOT APPLY TO NULLIFY FEDERAL SECURITIES LAWS

The Oklahoma Supreme Court has rewritten the McCarran-Ferguson Act to rationalize its deprivation of the protection of the federal securities laws to the Petitioners. If this opinion is allowed to stand, not only Oklahoma, but many other states, may rely upon the published opinions of the Oklahoma Supreme Court. This will deprive small business owners of the protection of the federal securities laws, including required disclosures to purchasers of interests in thousands of similar associations. The Oklahoma Supreme Court does *not* contend the interests are not securities, simply that as to the Securities Act of 1933, the McCarran-Ferguson Act preempts the Securities Act of 1933;[2] and that the 1996 Amendment to 85 O.S. § 149.1 exempts interests in these associations from Oklahoma State Securities laws. App. 10 and 19-22. See 15 U.S.C. § 77b.

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[2] At App. 28, the Oklahoma Supreme Court states "Without citation of authority Colbert contends the Oklahoma Employers Safety Group violated federal securities laws". This is a factually inaccurate statement. Excerpts from Colbert's Trial Court Briefs citing such authority are set out in the Appendix at App. 56-72.

The Oklahoma Supreme Court's opinion regarding the McCarran-Ferguson Act flies directly in the face of *Howlett By and Through Howlett v. Rose*, 496 U.S. 356 at 357, 110 S.Ct. 2430 at 2432, 110 L.Ed.2d 332 (1990), interpreting the supremacy clause to forbid state courts to disassociate themselves from federal law because of a disagreement with the content or refusal to recognize superior authority of its source.

Holloway v. Peat, Marwick, Mitchell & Co., 879 F.2d 772 (10th Cir. 1989 Okl.), cert. granted and vacated, *Peat Marwick Main & Co. v. Holloway*, 494 U.S. 1014 on remand 900 F.2d 1485 at 1488 (10th Cir. 1990), cert. denied, *KPMG Peat Marwick v. Holloway*, 498 U.S. 958 held that the State of Oklahoma could *not* displace the applicability of Federal Securities laws to issuers of passbook savings certificates, and held:

> " . . . By analogy, state regulation of the transaction should not be a factor governing application of the remedial federal securities laws. We therefore reaffirm our holding in *Holloway* that under the supremacy clause, U.S. Const. art. VI, cl. 2, our focus must be on *federal* regulation; state regulatory schemes cannot displace the Acts. *Id.* at 1488."

The Oklahoma Court's July 8, 1997 *Opinions* fail to support this principle.

The Respondents did not dispute their failure to comply with federal and state securities laws regarding the solicitation and sales of ownership interests in the associations (which would have enabled the Petitioners and other small business owners to make an informed decision to participate). Instead, the sole claim was that the

Petitioners were not afforded protection of *any* securities laws and no such information was required to be furnished to Petitioners.

SUBPROPOSITION IA: THIS COURT HAS PREVIOUSLY FOUND THE SECURITIES AND OTHER FEDERAL "ACTS" ARE NOT IMPEDED OR BARRED BY THE MCCARRAN-FERGUSON ACT

The McCarran-Ferguson Act, in part, states as follows:

> No act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless the act specifically relates to the business of insurance: . . .

See 15 U.S.C. § 1012(b).

Federal Securities Laws Decisions

In *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969), this Court held that the Securities and Exchange Commission was not barred by the McCarran-Ferguson Act to enforce federal securities regulation of insurance securities on the basis that such laws would preempt state laws regulating insurance businesses. Therein, this Court further held that the McCarran-Ferguson Act does not make states "supreme" as to the regulation of activities of insurance companies.

> "In this case, Arizona is concerning itself with a marketedly different set of problems. It is

> attempting to regulate not the "insurance" relationship, but the relationship between a stockholder and the company in which he owns stock . . . The crucial point is that here the State has focused its attention on stockholder protection; it is not attempting to secure the interests of those purchasing insurance policies. Such regulation is not within the scope of the McCarran-Ferguson Act."

SEC v. Nat'l Sec., Inc., 393 U.S. at 462, 89 S.Ct. at 569.

This rationale was followed by the federal district court of North Carolina in holding that the McCarran-Ferguson Act does not bar federal securities' claims arising out of the sale of an insurer's financial security plans. See *Liner v. DiCresce*, 905 F.Supp. 280 (M.D.N.C. 1994).

Other Decisions

In 1985, this Court further held that the McCarran-Ferguson Act does not bar or limit the applicability of the Equal Protection Clause to activities involving insurance companies. See *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985).

As recently as 1996, this Court has further clearly indicated that rights granted under federal laws specifically relating to the ability to sell insurance supersede state laws prohibiting such sales and that the "anti-preemption" language of the McCarran-Ferguson Act does not apply to allow the state law to displace or supersede the federal law. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 116 S.Ct. 1108, 134 L.Ed.2d 237 (1996).

SUBPROPOSITION IB: THE PETITIONERS ARE NOT IN THE "BUSINESS" OF INSURANCE

The principal elements for the application of the McCarran-Ferguson Act to deprive the Petitioners herein of the protection of federal securities laws were set forth by this Court in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 at 129, 102 S.Ct. 3002 at 3008, 73 L.Ed.2d 647 (1982). This Court therein held that among other elements, in order to "engage" the preemption of the McCarran-Ferguson Act, the term "engaging in the insurance business" must be applied *only* when three factors are met:

> " '*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.' " *Id.* at 2206.

This rationale was later supported by this Court in *Pilot Life Insurance Co. v. Bedeaux*, 481 U.S. 41 at 48-49, 107 S.Ct. 1549 at 1553-54, 95 L.Ed.2d 39 (1987). Clearly, the Petitioners are *not* entities within the insurance industry.

In fact, this Court has recently held that the term "business" in the McCarran-Ferguson Act refers to mercantile transactions, buying, selling and traffic of insurance (*not* selling of an interest in the insurance company itself). *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 at 781, 113 S.Ct. 2891 at 2901, 125 L.Ed.2d 612 (1993).

This rationale was followed by the District of Columbia Circuit Court of Appeals in 1996, when it held that selling a fractional interest in policies of insurance was

not the "business of insurance" necessary for the McCarran-Ferguson Act to exempt the application of federal securities laws. *Securities and Exchange Commission v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996).

This Court has also held that provider agreements with hospitals and doctors are not "the business of insurance" for purposes of the application of the McCarran-Ferguson exemption to anti-trust laws. *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979). The Fifth Circuit also held that methods of inducing borrowers to purchase insurance were not contemplated by Congress as the "business of insurance" exemption allowed by the McCarran-Ferguson Act. *Federal Trade Commission v. Dixie Finance Company, Inc.*, 695 F.2d 926 (5th Cir. 1983), cert. denied, 461 U.S. 928, 103 S.Ct. 2088, 77 L.Ed.2d 299 (1983).

SUBPROPOSITION IC: THERE IS NO STATE STATUTE THAT IS "INVALIDATED, IMPAIRED OR SUPERSEDED" NECESSARY TO APPLY THE EXEMPTION OF THE MCCARRAN-FERGUSON ACT

In 1993, this Court held that the McCarran-Ferguson exemption would not apply *unless* it were proven that there was a state statute that was invalidated, impaired or superseded by the application of the questioned federal statute. *U.S. Department of Treasury v. Fabe*, 508 U.S. 491 at 501, 113 S.Ct. 2202 at 2208, 124 L.Ed.2d 449 (1993). In the instant proceeding, the implication appears to be that Federal Securities laws impair Oklahoma's regulation of the associations pursuant to 85 O.S. 1996 § 149.1. However, there is no logical explanation *why* the application of the federal securities laws (to insure protection to small

business owners) will impair or impede any portion of the state's requirement that employers provide workers' compensation protection for their employees; or that requiring compliance with *both* Acts (85 O.S. § 149.1 and 15 U.S.C. § 77a et seq.) will not benefit all interested persons. Prudent public policy demands that the small business owners be given the federally intended protection from misrepresentation and omission in the sale of unregistered securities. This paramount federal interest of protecting purchasers is perfectly compatible with the state interest in ensuring that the small business owner secure workers' compensation benefits for their employees. See *SEC v. National Securities, Inc., supra,* 393 U.S. at 463, 89 S.Ct. at 570.

Accordingly, certiorari should be granted to review the decision of the Oklahoma Supreme Court as it has decided an important question of federal law that has not been, but should be settled by this Court as it relates to state group workers compensation associations, and in doing so has decided an important federal question in a way that conflicts with relevant decisions of this Court.

PROPOSITION II: THE OKLAHOMA SUPREME COURT'S RETROACTIVE APPLICATION OF A LEGISLATIVE AMENDMENT RENDERING STATE SECURITIES LAWS INAPPLICABLE TO A GROUP SELF-INSURER ASSOCIATION DIVESTED PETITIONERS OF A VESTED RIGHT TO A DEFENSE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Effective November 1, 1996, *after* (1) the YWCA Petitioners had prevailed in the District Court and (2)

Petitioner Colbert had asserted the "securities" issue as a counterclaim in the District Court, the Oklahoma legislature passed an amendment to 85 O.S. § 149.1. The amendment included the following new sub-part C, to wit:

> "A group self-insurer created pursuant to this section either prior to or after the effective date of this act shall not be subject to the provisions of the Oklahoma Securities Act."

The purchases of the interests in the Respondent associations had occurred years before the amendment's enactment or effective date. The Oklahoma Supreme Court's ruling, relying upon this new amendment to hold the Petitioners were not protected by the Oklahoma Securities Act, constituted an impermissible destruction of a defense, violating the due process clause of the Fourteenth Amendment to the U.S. Constitution. The due process clause prohibits any state from depriving any person of property "without due process of law". Prior to the Oklahoma Supreme Court's retroactive application of the amendment to 85 O.S. § 149.1., the Petitioners had vested rights in this defense under the provisions of the Oklahoma Securities Act. Title 71, Oklahoma Statutes § 1 et seq.

The retroactive application of Section 149.1.C destroyed a defense available to Colbert and was, therefore, an illegal taking of property. Defendant had more than just an expectation that the law would not change. Defendant had an accrued and vested contractual right prior to the November, 1996 amendment.

The Oklahoma Supreme Court on page 8 of its Opinion (App. 10 and 21), states that the amendment to 85

O.S. § 149.1 was a matter of "establishing a policy". The retroactive application of the amendment offends the due process clause in both the Constitution of the United States, and Oklahoma's own Constitution.[3] (See *McDonald v. Champion*, 962 F.2d 1455 (10th Cir. 1992, Okl.), cert. denied, 506 U.S. 890.

Additionally, federal legislation is subject to the same test as addressed by the Tenth Circuit Court of Appeals in *Lennox v. Evans*, 87 F.3d 431 at 432 (10th Cir. 1996 Okl.), citing to this Honorable Court, to wit:

> As specified by the Supreme Court, a statute has 'retroactive effect' when applied to a case filed prior to passage of the new legislation if 'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'

See *Landgraf v. USI Film Products*, 511 U.S. 244, 280, 114 S.Ct. 1483 at 1505, 128 L.Ed.2d 229 (1994).

This Court in *Landgraf, supra*, also held that "The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; . . . " *Id.* (511 U.S. 244 at 266) See also, *Landgraf, supra*, 511 U.S. at 270.

The Tenth Circuit has held that an amendment to a statute cannot retroactively invalidate a law which was in force when the incident in question occurred (herein, the

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[3] Article 5, Section 52, " . . . After suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit."

sale of ownership interests in the group insurance associations). *Sellers v. Allstate Insurance Co.*, 82 F.3d 350 (10th Cir. 1996).

When the Oklahoma Supreme Court first raised the issue of retroactive application of the legislation in its Opinion (as to the YWCA Petitioners), it failed to consider the United States Constitution, Article I, Section 10, i.e., "Contract Clause", which provides: "No state shall . . . pass any . . . law impairing the obligation of contracts." The inquiry into the validity of state legislation under the contract clause has three components: "whether there is a contractual relationship, whether a change in the law impairs that contractual relationship, and whether the impairment is substantial". *General Motors Corp. v. Romein*, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). The "threshold inquiry is whether state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 at 244, 98 S.Ct. 2716 at 2722, 57 L.Ed.2d 727 (1978).

The laws in existence at the time of the contract enter into and form a part of the contract as if they were expressly referred to or incorporated in its terms. See *Home Building Loan and Association v. Blaisdell*, 290 U.S. 398 at 429-430, 54 S.Ct. 231 at 237, 78 L.Ed. 413 (1934). There is a presumption that contracting parties adopt the terms of their bargain in reliance upon the law in effect at the time. *United States Trust Company of New York v. New Jersey*, 431 U.S. 1 at 19, 97 S.Ct. 1505 at 1516, 52 L.Ed.2d 92 (1977).

Thus, the retroactive application of 85 O.S. § 149.1.C allows the offending group insurance associations to escape from complying with obligations under Oklahoma securities laws in effect at the time of contracting. Thereby, the group self-insurance associations are allowed to avoid the consequences of their prior failure to comply with the law in effect at the time of the agreement. This completely changes the contractual relationship between the parties, to the detriment of the small business owners.

Accordingly, certiorari should be granted to review the decision of the Oklahoma Supreme Court as it has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

CONCLUSION

In the opinions sought to be reviewed the Oklahoma Supreme Court has completely denied small business owners in the State of Oklahoma (1) the protection of federal securities laws based upon the preemption language of the McCarran-Ferguson Act; and (2) the protection of the Oklahoma Securities laws by allowing the retroactive application of a substantive legislative amendment. If the Oklahoma Supreme Court opinions are allowed to stand, they will be relied upon, not only as precedential authority in the State of Oklahoma, but persuasive authority throughout the many states allowing sales of ownership interests in similar group associations. These issues must be addressed by this Court to require such insurance associations to "speak the truth" when

soliciting the unwary small business owner; as well as protect vested rights of due process afforded citizens of the United States.

Respectfully submitted,

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1997 OK 95

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

SELF INSURERS' MANAGEMENT GROUP, Plaintiff/Appellant, v. THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, C & H POWER LINE, CHRIS HUNT WATER HAULING and JOHN VANCE MOTORS, Defendants/Appellees.	No. 86,718 (companion with No. 88,818) (Filed Jul. 8, 1997) **FOR OFFICIAL PUBLICATION**

APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE NILES JACKSON, JUDGE

The trial court entered summary judgment for the thirteen Defendants/Appellees listed in the style, and against Plaintiffs/Appellants, Self Insurors' Management Group, known as the Association. The Association sued the Defendants/Appellees and others for breach of contract. Defendants/Appellees and hundreds of others were members of the Association. The Association's members

were self insured employers who, under the authority of 85 O.S. 1981 § 149.1, had joined together through the Association to obtain workers' compensation insurance in exchange for premiums paid by each member. The Association sued certain of its members, including Defendants/Appellees, for non payment of premiums. The trial court granted summary judgment against the Association on the grounds that (1) the agreements between the parties were unregistered securities and for that reason could not be enforced against Defendants/Appellees, and (2) the agreements violated Workers' Compensation Court rules in that Defendants/Appellees had no common interest in obtaining workers' compensation insurance because there was "no recognizable common purpose" between them for combining to buy insurance. On January 18, 1996, the trial court entered a Final Journal Entry of Judgment Limited as to Certain Parties and Issues holding as indicated above. The Association appeals from the trial court's Final Journal Entry.

JUDGMENT REVERSED AND
REMANDED WITH INSTRUCTIONS

Larry Derryberry, David B. Dykeman, Derryberry, Quigley, Parrish & Solomon Oklahoma City, Oklahoma For Appellant.

Bradley D. Brickell, Mahaffey & Gore, Oklahoma City, Oklahoma For Appellees.

WATT, Justice.

This is an appeal from the judgment of the District Court of Oklahoma County, Oklahoma, Honorable Niles

Jackson, Judge. The trial court granted summary judgment for the thirteen Defendants/Appellees listed in the style of this appeal, and against Plaintiff/Appellant, Self Insurors' Management Group. On October 21, 1996, we withdrew this case from assignment to the Court of Civil Appeals because of its important public policy implications. On January 31, 1997 we ordered that jurisdiction be retained in this appeal and that it be made a companion case with *Oklahoma Employers Safety Group, S.I.A. v. Colbert Nursing Homes, Inc.*, No. 88,818, ___ OK 1997, ___ P.2d ___ (Okla. 1997), decided this day, because it involves the same important public policy issues.

FACTS AND PROCEDURAL HISTORY

In 1981 the Legislature passed 85 O.S. 1981 § 149.1, which directed that "The Workers' Compensation Court shall adopt rules permitting two or more employers . . . to pool together liabilities under this act for the purpose of qualifying as a group self insurer. . . . " Section 149.1 allowed small employers to pool their risks of workers' compensation liabilities and, thereby, spread their risk of loss among a far larger group of employers than an individual employer could do. By joining a group self-insurer, employers could avoid paying the profit built into a commercial insurance company's workers' compensation premiums. Those employers joining in the group however, jointly and severally undertook the risk of loss that insurance companies would otherwise have assumed.

In 1982 the Workers' Compensation Court approved Self Insurors' Management Group, then known as the

Oklahoma City Drillers Association, to act as a group self-insurance association in accordance with § 149.1. The Association, with the approval of the Workers' Compensation Court, changed its name to Self Insurors' Management Group in 1984.

During the mid 1980s several hundred small employers, including the Defendants/Appellees, joined the Association. In 1989 the Association ceased to provide new coverages for its members because of heavy underwriting losses, but was authorized by the Administrator of workers' compensation to continue business in order to wind up its affairs.

This long and tortured litigation began on November 3, 1989 when the Association filed this suit against hundreds of its members, including Defendants/Appellees. It sued for breach of its Application for Membership, Indemnity Agreement, and Power of Attorney that each of its members had executed upon joining the organization. Such agreements were required by Rule 3 of the Workers' Compensation Court's Rules, which governed group self-insurers. The Agreement stated that

> Each and every Member jointly and severally agrees to assume, pay and discharge any liability under the [Workers' Compensation] ACT of any and all members of the ASSOCIATION and each Member agrees to pay any assessments as may be required by the BOARD [of Directors of the Association].

In its original petition, the Association sought to require the payment of unpaid assessments that its members had failed to pay in violation of the terms of the Agreement. The Association filed an amended petition on

March 31, 1994 claiming that each named defendant was jointly and severally liable for $2,500,000, which was the aggregate amount owed to the Association by its members to cover the Association's losses. Earlier, on December 3, 1991, the District Court of Oklahoma County, while the case was assigned to Judge Virgil C. Black, denied the "Defendants Motion for Summary Judgment" on the ground that the Agreements did not violate the securities laws. The record does not identify which defendants the 1991 order referred to, as those defendants' motion for summary judgment was not made a part of the record on appeal.

On July 31, 1995 the Defendants/Appellees filed a motion for summary judgment in which they claimed that (1) the Agreements were unregistered securities and, therefore, illegal, unenforceable, and void; and (2) Plaintiff materially breached the Agreements. The trial court granted summary judgment for Defendants/Appellees and as part of its order allowed for an immediate appeal. This part of the order was made necessary because other defendants were not parties to Defendants/Appellees motion for summary judgment.

In its order, entitled "Final Journal Entry of Judgment Limited as to Certain Parties and Defendants," the trial court confirmed its order granting Defendants/Appellees summary judgment and overruled Plaintiff's motion for new trial. The trial court based its ruling in favor of Defendants/Appellees on the following conclusions: (1) the Agreements were unregistered securities and could not be enforced against Defendants/Appellees, and (2) Plaintiff materially breached the Agreements because there was "no recognizable purpose for associating"

among Association's members, in violation of Workers' Compensation Court Rules. The Rules relied on by the trial court, Rule 3, Sections 3(b) and (d), provide:

> (b) "Group self-insurance association" or "association" means an association organized by two or more employers having a common interest which have entered into agreements under the Oklahoma Workers' Compensation Act.
>
> . . .
>
> (d) "Common interest" means employers engaged in the same or similar types of business or who otherwise have a recognizable common purpose for associating. . . .

ISSUES

> (1) Were the Agreements unregistered securities and therefore unenforceable against Defendants/Appellees?
>
> (2) Did the trial court correctly rule that the Agreements violated Workers' Compensation Court rules because there was no "common interest" between the Association's members?

We answer no to each question.

DISCUSSION

I.

In this part of our opinion we will consider whether the Association's Agreements with its members violated the Oklahoma Securities Act. For the reasons set forth in the balance of this part of the opinion we believe that the Agreements did not violate the Oklahoma Securities Act.

In 1996 the Legislature amended 85 O.S. Supp. 1996 § 149.1 by adding subsection C, which states:

> A group self-insurer created pursuant to this section either prior to or after the effective date of this act shall not be subject to the provisions of the Oklahoma Securities Act.

This amendment to § 149.1 makes abundantly clear the Legislature's intention that the agreements of all members of all associations created under the terms of § 149.1, including the Agreements at issue here, are not covered by the Oklahoma Securities Act. We note that the trial court ruled that the Securities Act was violated without the benefit of the Legislature's clear mandate to the contrary in its 1996 amendment to § 149.1.

Defendants/Appellees rely on the rule that the validity of a judgment must be measured by the law in force when it was rendered, citing *Evans v. Evans*, 852 P.2d 145 (Okla. 1993). The *Evans* rule does not apply here for two reasons. First, the judgment at issue in *Evans* was a final judgment. Here, however, the Defendants/Appellees' judgment was not final, as the Association filed a timely appeal. Second, the judgment at issue in *Evans* was a property division decree in a divorce case, and, under 42 [sic] O.S.1991 § 134.A, property division provisions in divorce decrees are "irrevocable and not subject to subsequent modification." *Evans*, 852 P.2d at 148. The issue in *Evans* was whether subsequent legislation making military retirement benefits reachable in divorce actions changed the rule established by 42 [sic] O.S. § 134. We held that the property division decree remained effective under 42 [sic] O.S. § 134. By contrast to *Evans*, no express Oklahoma law made group self-insurance agreements

subject to the Oklahoma Securities Act before the 1996 amendment to § 149.1. In fact, it seems clear to us that the Legislature amended § 149.1 to clarify what it perceived the law to have been since the passage of § 149.1 in 1981.

Defendants/Appellees also contend that they have a vested right in the trial court's determination that the Agreements were void as being contrary to the Oklahoma Securities Law, so that § 149.1.C should not be applied retroactively, despite its clear language. We disagree. Defendants/Appellees rely on *Texas County Water Irr. and Water Resources Ass'n v. Oklahoma Water Resources Bd.*, 803 P.2d 1119 (Okla. 1990). That case, does not support Defendants/Appellees position. There we held that where a prior enactment is ambiguous there is a presumption that subsequent legislation amending the act "was designed to clarify its text." This is the situation before us here. Defendants/Appellees do not suggest what it is that gave them a vested interest in the trial court's decision, and we see nothing that could have done so.

The Legislature has established a clear public policy that compensation to employees covered by the Workers Compensation Act be secured. Title 85 O.S. Supp. 1994 § 61 requires that compensation shall be secured either through insurance or through a self-insurance arrangement establishing the employer's ability to pay. In 1993 the Legislature added Subsection B to § 61, which provides:

> An employer upon application to become a member of a group self-insurance association shall file with the Administrator of the Workers' Compensation Court a notice . . . acknowledging that the employer by entering into the group

> self-insurance association, accepts joint and several liability. Such notice shall be submitted to the Workers' Compensation Court with the application for membership.

Under Section 6 of Rule 3, every applicant for membership in a group self-insurance association must file with the Workers' Compensation Court an application form, which the Workers' Compensation Court must approve before an applicant may become a member of a group self-insurance association. In its application, each applicant for membership must "include evidence of the execution of the indemnity agreement and power of attorney required by Section 12 [of Rule 3]." Thus, Defendants/Appellees are bound to joint and several liability under the Workers' Compensation Court Rules, as well as under the Agreement. The clear purpose of this requirement is to insure that there will be funds to pay workers' compensation awards to injured workers.

Defendants/Appellees claim that they were entitled to assert Oklahoma Securities Act defenses before the 1996 amendment to § 149.1. But this is not necessarily so. Section 149.1 was silent with respect to whether the Securities Act would apply to agreements made under its terms. Thus, there was no statutory or case law indication prior to the trial court's ruling to support Defendants/Appellees claim that Defendants/Appellees have a vested interest in having their Agreements deemed securities.

In passing § 149.1 and allowing employers to join group self-insurance associations, the Legislature meant to provide security for workers' compensation payments

to employees of such associations. To carry out this public policy, the Legislature decided that members of group self-insurance associations would not be covered by the Oklahoma Securities Act. This was a policy decision with retroactive effect on the existing Self Insurors' Management Group regimes now in force, to which this Court will defer.

Because of our conclusion that the Securities Act does not apply here, we deny the Application for Leave to File Amicus Curie Brief filed by several former members of group self-insurer associations. The proposed amicus brief deals exclusively with whether agreements made under the pre 1996 version of § 149.1 are securities under the Oklahoma Securities Act. The Legislature, by its 1996 amendment to § 149.1 established as a matter of Oklahoma public policy that such agreements are not covered by the Securities Act, thus whether such agreements would have been securities had the Securities Act applied to them is irrelevant to the issues before us.

Because § 149.1 was not amended until after the trial court ruled in this matter, the matter must be assessed in the first instance by the trial court. *American Insurance Association v. State Industrial Commission*, 745 P.2d 737, 740 (Okla. 1987). We therefore reverse and remand this matter to the trial court with instructions to proceed in a manner consistent with this opinion, and with our opinion in the companion case, *Oklahoma Employers Safety Group, S.I.A. v. Colbert Nursing Homes, Inc.*, No. 88,818, ___ OK 1997, ___ P.2d ___ (Okla. 1997).

II.

The Association appeals from the trial court's ruling that there was no disputed issue of material fact as to whether there was a "recognizable common purpose for [the Association's members] associating." We hold that the trial court erred.

Rule 3, Section 3(b), of the Workers' Compensation Court's Rules, the Rule governing group self-insurer associations, requires that the members of a self-insurance association have a "common interest." Section 3(d) says that " 'Common interest' means employers engaged in the same or similar types of business *or who have a recognizable common purpose for associating.*" [Emphasis added.] Defendants/Appellees would have us hold that the Association's members had no "common interest" in associating themselves with the Association because the members' businesses were dissimilar. We find this contention unconvincing because it ignores the emphasized portion of Section 3(d) set out above. The Workers' Compensation Court expressly authorized group self-insurers to have members who had a "recognizable common purpose for associating." We hold that the broad standard of Section 3(d) encompasses those members who joined because they were willing to take the risk of being self insured in return for the possibility that they would pay less for group self-insurance than for private insurance.

Section 4 of Rule 3 provides that the Workers' Compensation Court will review the applications of all group self-insurance associations "on an annual basis to determine continued compliance with the law and these

regulations." Presumably, therefore, the Workers' Compensation Court was aware that the Association had members whose businesses were dissimilar, but the record does not reflect that the Workers' Compensation Court objected to it. As noted earlier, Rule 12 requires that every member of a group self-insurance association execute an indemnity agreement "subject to the approval of the Court," and 85 O.S. Supp. 1994 § 61.B requires applicants for membership in an association to file with the Workers' Compensation Court a notice acknowledging its acceptance of such liability. We conclude, therefore, that the trial court erred in holding that Workers' Compensation Court's Rules prohibited dissimilar businesses from joining a group self-insurance association. We hold that the association of Defendants/Appellees here was appropriate under the statutes and Workers' Compensation Court Rules.

In addition to the two issues before us today, the trial court considered and denied Defendants/Appellees' motion for summary judgment on the issues of whether joint liability could be imposed against Defendants/Appellees and whether the Association breached the Agreements by failing to hold annual elections of its supervisory board. While those issues are not expressly before us today, we observe for the benefit of the trial court and the parties on remand of this matter that both the statutes and the Workers' Compensation Court Rules relating to group self-insurance associations require members of such associations to accept joint and several liability as a condition of membership. 85 O.S. Supp. 1994 § 61.C; Rule 3, Section 12, Rules of the Administrator of the Workers' Compensation Court.

Defendants/Appellees' contention that breach of the failure to hold elections of the Association's Board is equally unpersuasive. Section 11 of Rule 3, Rules of the Administrator, explicitly requires the Association to make up any deficits it may sustain by, among other means, "assessment of the membership."

Finally, the relevance of the Association's failure to hold elections as an excuse for Defendants/Appellees' failure to comply with the clear requirements of the Rules escapes us. There is nothing in the record to indicate that any of the Defendants/Appellees expressed any concern on this score prior to being sued by the Association.

CONCLUSION

Because § 149.1 was not amended until after the trial court ruled in this matter, the matter must be assessed in the first instance by the trial court. We therefore direct that on remand the trial court afford Defendants/Appellees the opportunity to litigate the issue in the trial court and thereafter rule in a manner consistent with this opinion and our opinion in the companion case. The trial court erred in holding that the Association breached the Agreements by allowing members having dissimilar businesses to join the Association. We therefore reverse and remand this matter to the trial court with instructions to proceed in a manner consistent with this opinion, and with our opinion in the companion case.

JUDGMENT REVERSED AND
REMANDED WITH INSTRUCTIONS

KAUGER, C.J., SUMMERS, V.C.J., HODGES, OPALA, and WATT, JJ. – concur.

SIMMS, J. – concurs in result only.

LAVENDER, HARGRAVE, and WILSON, JJ. – concur in part, dissent in part.

1997 OK 94

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A., Plaintiff/Appellant, v. COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation, Defendant/Appellee, and Third Party Plaintiff, v. DAVID DANK, Third Party Defendant.	No. 88,818 (companion with No. 86,718) (Filed Jul. 8, 1997) **FOR OFFICIAL PUBLICATION**

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE NILES JACKSON, JUDGE

Appeal from the judgment of the District Court of Oklahoma County, Honorable Niles Jackson, Judge, granting summary judgment for Defendant/Appellee, Colbert Nursing Home, Inc., Oklahoma Employers Safety Group, Plaintiff/Appellant, also moved for summary judgment, which the trial court denied. Oklahoma Employers Safety Group sued Colbert for nonpayment of premiums under a workers' compensation group self-insurance agreement made under 85 O.S. 1981 § 149.1. Section 149.1 authorizes Oklahoma employers to join

group self-insurance associations for the purpose of providing workers' compensation insurance. The trial court's judgment did not state its grounds for granting summary judgment to Colbert. The trial court entered judgment under 12 O.S. 1991 § 994.A as to Oklahoma Employers Safety Group and Colbert. The issues involving the third party defendant David Dank remain unresolved and Dank is not a party to this appeal. Colbert's brief in support of its motion for summary judgment, however, was grounded on three theories, which Colbert claimed made the Agreement void and unenforceable: (1) state securities laws violations, (2) federal securities law violations, and (3) Oklahoma Employers Safety Group's failure to comply with Workers' Compensation Court Rules. We retained jurisdiction of this appeal due to the important public policy issues involved, and made it a companion case with *Self Insurors' Management Group v. The YWCA of Oklahoma City, et al.*, No. 86,718, ___ P.2d ___ (Okla. 1997), also decided today.

JUDGMENT REVERSED AND
REMANDED WITH INSTRUCTIONS.

Don R. Nicholson, II, Mark J. Pordos, Kent A. Nicholson, Getulio C. "Bud" Newberry, Eagleton & Nicholson, P.C., Oklahoma City, for Plaintiff/Appellant.

Clifford A. Wright, Clifford A. Wright, P.C., Oklahoma City, Oklahoma, Attorney for Defendant.

WATT, Justice.

The Facts and legal issues of this appeal are similar to those before us in *Self Insurors' Management Group v. The YWCA of Oklahoma City, et al.*, No. 86,718, ___ P.2d ___

(Okla. 1997), also decided today. Oklahoma Employers Safety Group moved that this Court retain jurisdiction of this appeal and make it a companion case to the *Self Insurors' Management Group* appeal. We granted Oklahoma Employers Safety Group's motion on January 31, 1997. We did so because both this case and *Self Insurors' Management Group* present the same important issue of public policy dealing with the construction of a recent amendment to 85 O.S. Supp. 1996 § 149.1.

FACTS

On August 2, 1996, Oklahoma Employers Safety Group sued Colbert Nursing Homes, Inc for unpaid workers' compensation insurance premiums of $58,060. Oklahoma Employers Safety Group is a group self-insurance association formed under 85 O.S.1991 § 149.1 for the purpose of allowing multiple employers to join together to provide workers' compensation insurance. Oklahoma Employers Safety Group is regulated by the Workers' Compensation Court, as mandated by § 149.1. Colbert is one of Oklahoma Employers Safety Group's members. Colbert filed an answer and counterclaim alleging that Oklahoma Employers Safety Group had breached its Agreement with Colbert, and that the Agreement was unenforceable because it was an unregistered security.

When it was formed, Oklahoma Employers Safety Group's bylaws provided that its members' supervisory board would be appointed by Oklahoma Employers Safety Group's president, although the Workers' Compensation Court Rules relating to group self-insurance associations provided that board members should be

elected by each association's members. On November 10, 1993 Oklahoma Employers Safety Group amended its bylaws to provide for election of its board by Oklahoma Employers Safety Group's members in accordance with Workers' Compensation Court Rules. Colbert did not begin to receive workers' compensation coverage from Oklahoma Employers Safety Group until August 25, 1994.

Colbert terminated its coverage with Oklahoma Employers Safety Group effective March 1, 1996, and requested an audit of its account. Oklahoma Employers Safety Group's audit showed that Colbert owed $58,060.00 in additional premiums. When Colbert refused to pay the additional premiums, Oklahoma Employers Safety Group filed this action.

Both Oklahoma Employers Safety Group and Colbert moved for summary judgment. The trial court granted Colbert's motion for summary judgment and denied Oklahoma Employers Safety Group's motion for summary judgment. The trial court's judgment did not state its grounds for granting summary judgment to Colbert. Colbert's brief in support of its motion for summary judgment, was grounded on three theories, which Colbert claimed made the Agreement void and unenforceable: (1) state securities laws violations, (2) federal securities law violations, and (3) Oklahoma Employers Safety Group's failure to comply with Workers' Compensation Court Rules. Oklahoma Employers Safety Group resisted Colbert's motion for summary judgment, and supported its own motion for summary judgment, by claiming that the amendment to § 149.1 made the Oklahoma securities Act unavailable to Colbert. The trial court granted judgment under 12 O.S.1991 § 994.A, so that Oklahoma Employers

Safety Group could appeal the judgment. The basis of the trial court's application of § 994.A was that the judgment was final as between Oklahoma Employers Safety Group and Colbert, but left unresolved all issues involving the third party defendant, David Dank. That this is the case is undisputed.

ISSUES

(1) Were the Agreements unregistered securities and therefore unenforceable against Defendants/Appellees, under either state or federal securities laws?

(2) Were the Agreements void because Oklahoma Employers Safety Group's bylaws violated Workers' Compensation Court rules concerning election of its members' supervisory board prior to Colbert's joining Oklahoma Employers Safety Group?

We answer no to each question.

DISCUSSION

I.

The Oklahoma Securities Act is Not Available to Colbert as A Defense to Oklahoma Employers Safety Group's Action.

Our discussion in Part I of the companion case to this matter, *Self Insurors' Management Group v. The YWCA of Oklahoma City, et al.*, No. 86,718, ___ P.2d ___ (Okla. 1997), also decided today, disposes of Colbert's claim that its Agreement with Oklahoma Employers Safety Group violated the Oklahoma Securities Act. The Legislature has implemented an important public policy of making sure

that payment of workers' compensation benefits to injured workers are secured. In doing so the Legislature has mandated in 85 O.S. Supp. 1996 § 149.1.C that

> A group self-insurer created pursuant to this section [149.1] either prior to or after the effective date of this act shall not be subject to the provisions of the Oklahoma Securities act.

Because of § 149.1.C, and for the reasons stated in *Self Insurors' Management Group*, we hold that the Oklahoma Securities Act is not available to Colbert here, and the trial court, therefore, erred in granting Colbert's motion for summary judgment on this issue and denying Oklahoma Employers Safety Group's motion for summary judgment.

Federal Securities Laws do Not Apply to the Facts of This Appeal.

Without citation of authority Colbert contends that Oklahoma Employers Safety Group violated federal securities laws. We disagree.

The Oklahoma Legislature authorized the formation of group self-insurance associations to provide another method whereby employers could provide workers' compensation insurance. In authorizing such associations under § 149.1, the Legislature provided that the Workers' Compensation Court would regulate such associations. The McCarran-Ferguson Act governs here. The Act provides:

> No act of congress shall be construed to invalidate, impair or supersede any law enacted by

> any state for the purpose of regulating the business of insurance. . . .

15 U.S.C. § 1012(b).

It is clear that Oklahoma Employers Safety Group's primary business was to provide workers' compensation insurance to its members, and that Colbert's primary purpose for joining Oklahoma Employers Safety Group was to obtain such insurance. Further, such associations and their members are regulated under the Oklahoma statutes and Workers' Compensation Court Rules. Under the McCarran-Ferguson Act, federal securities laws do not apply when state regulations govern the conduct of an insurer. *Federal Trade Com'n v. National Casualty Co.*, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958). As shown in our discussion in *Self Insurors' Management Group*, the Workers' Compensation Court Rules and Title 85 do regulate group self-insurers.

There is another and equally important reason why state law must prevail here. In this appeal, Colbert and Oklahoma Employers Safety Group's other members are not primarily investors. Instead, they are employers with statutory responsibility to secure payment of workers' compensation benefits to their injured employees. To the extent, if any, that group members could be said to be investors, their rights as investors must be held to be secondary to their responsibilities as employers. When it passed § 149.1.C the Legislature established a policy that such employers have no rights under state securities law. The legislation called for a comprehensive scheme of regulation, which has been implemented by the Workers' Compensation Court. Under these circumstances the

McCarran-Ferguson Act mandates that federal securities laws do not apply.

II.

Colbert claims that it is immune from liability here because Oklahoma Employers Safety Group breached the Agreement by failing to follow Workers' Compensation Court Rules relating to the manner in which Oklahoma Employers Safety Group's members' supervisory board was selected. In support of its contention, Colbert relies on *Stoltz, Wagner & Brown v. Cimarron Exploration Co.*, 564 F.Supp. 840 (W.D.Okla. 1981); *Miller v. Young*, 197 Okla. 503, 172 P.2d 994 (1946); and *Houser v. Sheehan*, 389 P.2d 94 (Okla. 1964). The cited cases do not fit the facts of this appeal. In each of those cases the plaintiff fundamentally breached the agreement upon which it sued. The rule established by these cases is that such a breach

> . . . is grounds for recission of a contract when such failure defeats the object of the contract or when it concerns a matter of such importance that the contract would not have been made if default in that particular area had not been expected.

Stoltz, 564 F.Supp. at 849; *Houser*, 389 P.2d at 97. In *Stoltz* plaintiff diverted $225,000.00 of well cost money that caused defendants well costs to increase dramatically. *Houser*, and *Miller* also involved breaches by parties who, by those breaches, had clearly hurt their opponents in the litigation. (*Houser*: breach of agreement that survivor of husband and wife would have the use of all the couple's

joint property; *Miller*: plaintiff failed to complete a building contract in violation of his agreement with defendants.) Here, there is no showing that the failure of the membership to elect the board damaged Colbert. Indeed, the claimed breach of the Agreement had been cured by the time Colbert joined Oklahoma Employers Safety Group in 1994 because Oklahoma Employers Safety Group amended its bylaws to comply with Workers' Compensation Court Rules in 1993. There was no basis in the record to support granting Colbert summary judgment on the ground that Oklahoma Employers Safety Group had breached the Agreement.

CONCLUSION

For the reasons stated in the companion case, *Self Insurors' Management Group v. The YWCA of Oklahoma City, et al.*, No. 86,718, ___ P.2d ___ (Okla. 1997), we hold 85 O.S. Supp. 1996 § 149.1.C precludes Colbert from relying on the Oklahoma Securities Act as a defense to Oklahoma Employers Safety Group's action against it. Further, Oklahoma Employers Safety Group's noncompliance with Workers' Compensation Court Rules concerning the manner in which its board members were selected is not available to Colbert as a defense. The record does not support the trial court's grant of summary judgment to Colbert. We reverse and remand this matter to the trial court with instructions to proceed in a manner consistent with this opinion and with our opinion in the companion case, *Self Insurors' Management Group v. The YWCA of Oklahoma City, et al.*, No. 86,718.

JUDGMENT REVERSED AND REMANDED WITH INSTRUCTIONS.

KAUGER, C.J., SUMMERS, V.C.J., HODGES, OPALA, and WATT, JJ. – concur.

SIMMS, J. – concurs in result only.

LAVENDER, HARGRAVE, and WILSON, JJ. – concur in part, dissent in part.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

SELF INSURORS MANAGEMENT GROUP,	)	Case No. CJ-89-9984
Plaintiff,	)	(Filed Jan. 18, 1996)
v.	)	
THE YWCA, et al.,	)	
Defendants,	)	
THE YWCA, et al., on behalf of themselves and all similarly situated members/shareholders of Self Insurors Management Group,	)	
Third-Party Plaintiffs,	)	
v.	)	
CHRIS STURN, individually, and SELF INSURORS MANAGEMENT GROUP,	)	
Third-Party Defendants.	)	

FINAL JOURNAL ENTRY OF JUDGMENT – LIMITED AS TO CERTAIN PARTIES AND ISSUES

This matter came on for hearing pursuant to Motions for Summary Judgment filed by certain of the Defendants. The Court, having had the matter under advisement and the Defendants hereinafter named having filed

briefs, responses, replies and other pleadings and pertinent materials, hereby directs the preparation and filing of this final judgment on the express determination that there is no just reason for delay. This final judgment should be filed adjudicating fewer than all claims, or rights and liabilities of fewer than all parties and shall not terminate the action as to any of the other claims or parties in order that this Court's Order(s) adjudicating summary judgment on October 5, 1995, and the Plaintiff's following Motion for New Trial, overruled on November 28, 1995, may become final for purposes of immediate appeal.

THE COURT HEREBY FINDS that the following Defendants are entitled to summary judgment in their favor and against the Plaintiff on the Plaintiff's claims in its Petition, as amended March 31, 1994, seeking judgment against said Defendants in the amount of $2,500,000.00, both jointly and severally. Those Defendants having so moved and being entitled to such judgment are: The YWCA of Oklahoma City, Century Martial Arts Supply, Inc., E & H Transfer, Inc., City Glass Co., C & H Power Line Construction, Inc., Chris Hunt Water Hauling, Oklahoma Steel & Wire, Inc., Flip's Wine Bar & Trattoria, Inc., Mangum Brick Company, Ronnie's Signs, Inc., Dalmarc Enterprises Incorporated, Barbara J. Wilson, John Vance Motors and Troy Wesnidge.

THE COURT FURTHER FINDS, pursuant to the undisputed material facts propounded by said Defendants in their Motions for Summary Judgment and supported by admissible evidence, as well as by Plaintiff's response to said Motions for Summary Judgment, that all

material facts necessary to grant said Defendants summary judgment on two (2) of their affirmative defenses were admitted or are deemed admitted pursuant to Rule 13 for the Rules of the District Courts for the State of Oklahoma.

THE COURT FURTHER FINDS that the herein-named Defendants have and take summary judgment as per affirmative defenses against the Plaintiff on Plaintiff's Petition, as amended on March 31, 1994; that Plaintiff's Motion for New Trial is overruled; and that Plaintiff take nothing against said Defendants on the claims for collection of indebtedness under the terms of the Application for Membership, Indemnity Agreement and Power of Attorney, or any other agreement or contract between the Plaintiff and said Defendants.

THE COURT FURTHER FINDS the herein-named Defendants are entitled to summary judgment as a matter of law on their Motion for Summary Judgment filed on August 21, 1995, on the grounds that the "agreements are unregistered securities and void" against Plaintiff's claims of indebtedness under the agreements entitled "Application for Membership, Indemnifying Agreement and Power of Attorney." This ruling is made on the basis that the agreements under which Plaintiff's action is brought constitute unregistered securities and therefore cannot be enforced against said Defendants.

THE COURT ADDITIONALLY FINDS that said Defendants are entitled to summary judgment based on their affirmative defense that the Plaintiff materially breached the agreement it now attempts to enforce which was argued and supported in their Motion for Summary

Judgment filed on July 31, 1995. The undisputed material facts as submitted by said Defendants, as well as Plaintiff's admissions under District Court Rule 13, show it was admitted that there was no common interest, i.e., "no recognizable common purpose for associating" as required by the Rules of the Worker's Compensation Court. Clearly, the Plaintiff was required by law and pledged in the indemnity agreement which it is attempting to enforce, that it would comply with the rules and regulations of the Worker's Compensation Court. The "applications for membership and indemnity agreements" signed by both the Defendants and the Plaintiff are rendered unenforceable by the Plaintiff due to the Plaintiff's actions in violating the Rules of the Worker's Compensation Court, revised in 1986, Section 3(B). Section 3(B) states: "a group of self-insured association means an association organized by two or more employers having a common interest which have entered into an agreement to pool their liabilities under the Oklahoma Worker's Compensation Act". The Rules of the Worker's Compensation Court were promulgated under 85 Okla. Stat. § 149.1.

THE COURT FURTHER FINDS that the Plaintiff's compliance with said law was required under the terms of the contract and under common law of the State of Oklahoma; therefore the indemnity agreements, i.e., "Application for Membership, Indemnifying Agreement and Power of Attorney" are unenforceable by the Plaintiff, because Plaintiff materially breached said agreements.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the following Defendants have and take summary judgment as per affirmative defenses set forth in the above findings against the Plaintiff on Plaintiff's

Petition, as amended on March 31, 1994; that Plaintiff's Motion for New Trial is **OVERRULED**; and that Plaintiff take nothing against said Defendants on the claims for collection of indebtedness under the terms of the Application for Membership, Indemnity Agreement and Power of Attorney or any other agreement or contract between the Plaintiff and said Defendants. **THE COURT SPECIFICALLY FINDS** that there is no just reason for delay and that this judgment should be filed for the express purpose of granting a right to immediate appeal. Defendants The YWCA of Oklahoma City, Century Martial Arts Supply, Inc., E & H Transfer, Inc., City Glass Co., C & H Power Line Construction, Inc., Chris Hunt Water Hauling, Oklahoma Steel & Wire, Inc., Flip's Wine Bar & Trattoria, Inc., Mangum Brick Company, Ronnie's Signs, Inc., Dalmarc Enterprises Incorporated, Barbara J. Wilson, John Vance Motors and Troy Wesnidge **are hereby awarded judgment in this action against the Plaintiff,** along with their costs.

Dated this 17 day of January, 1996.

/s/ Niles Jackson
THE HONORABLE
NILES JACKSON
JUDGE OF THE
DISTRICT COURT

I, TOM PETUSKEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla. this 18 day of Jan, 1996

TOM PETUSKEY, Court Clerk
By /s/ Misstzy Broching Deputy

Approved for entry:

/s/ Bradley D. Brickell
Bradley D. Brickell, OBA #1117
Mahaffey & Gore, P.C.
Two Leadership Sq., Suite 1100
211 North Robinson
Oklahoma City, OK 73102-7101
(405) 236-0478

ATTORNEYS FOR DEFENDANTS THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, OKLAHOMA STEEL & WIRE, INC., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, JOHN VANCE MOTORS AND TROY WESNIDGE

David B. Dykeman, OBA #11819
Derryberry, Quigley, Parrish,
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(405) 528-6569

ATTORNEYS FOR PLAINTIFF

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,	)	
Plaintiff,	)	Case No.
vs.	)	CJ-96-5268-65
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,	)	(Filed Jan. 24, 1997)
Defendant and Third Party Plaintiff,	)	
vs.	)	
DAVID DANK,	)	
Third Party Defendant.	)	

JUDGMENT

On January 16, 1997 this action comes before the Court on the Motion For Summary Judgment of Plaintiff, Oklahoma Employers Safety Group, S.I.A. ("OESG"), appearing by counsel of record Mark Pordos and Kent Nicholson, and the Motion For Summary Judgment of the Defendant Colbert Nursing Home, Inc. ("Colbert"), appearing by counsel of record Clifford A. Wright.

The Court, having considered the arguments and reviewed the Briefs in the case and being fully advised, finds that the OESG's Motion For Summary Judgment should be denied, and Colbert's Motion For Summary Judgment should be granted.

The Court further finds that although there is a Third Party Defendant, David Dank, named herein, he was not a party to the two Motions described herein and the Motions before the Court determine all claims between OESG and Colbert exclusive of attorneys fees and costs, and the Court directs the preparation and filing of this Judgment disposing of all the claims between OESG and Colbert, exclusive of attorneys fees and costs, and finds that there is no just reason for delay in the filing of this Judgment, and directs the immediate filing of this Judgment, pursuant to 12 O.S. §994(A).

IT IS THEREFORE ORDERED that Plaintiff's Motion For Summary Judgment is denied, Defendant's Motion For Summary Judgment is granted, and this Judgment is final pursuant to 12 O.S. §994(A).

Dated this 16th day of January, 1997.

NILES JACKSON
Niles Jackson, District Court Judge

APPROVED AS TO FORM:

/s/ Clifford A. Wright
Clifford A. Wright, OBA #9904
CLIFFORD A. WRIGHT, P.C.
Two Leadership Square
211 North Robinson, Suite 1300
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Attorney for Defendant

/s/ Kent Nicholson
Mark Pordos, OBA # 11476
Kent A. Nicholson, Esq., OBA # 16706
Eagleton & Nicholson, P.C.
201 Robert S. Kerr Avenue, Suite 310
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(405) 236-0550
(405) 236-0560 (Fax)
Attorneys for Plaintiff

I, PATRICIA PRESLEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a True, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerks Office of Oklahoma County, Okla. this 24 day of Jan, 1997

PATRICIA PRESLEY, Court Clerk

By /s/ Illegible Deputy

KAUGER, C.J.
SUMMERS, V.C.J.
HODGES, J.
LAVENDER, J.
SIMMS, J.
HARGRAVE, J.
WILSON, J.
WATT, J.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SELF INSURERS' MANAGEMENT GROUP, Plaintiff/Appellant, v. THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, C & H POWER LINE, CHRIS HUNT WATER HAULING, and JOHN VANCE MOTORS. Defendants/Appellants.	No. 86,718 (companion case with No. 88,818) (Filed Mar. 9, 1998)

ORDER

Petitions for rehearing by defendants-appellees in Cause No. 86,718 and by Colbert Nursing Home, Inc., appellee in Cause No. 88,818 are denied.

Recoverable costs shall be taxed *de cursu* in favor of the appellant in each cause. 12 O.S. 1991 § 978; *Wilson v. Glancy*, 1995 OK 141, 913 P.2d 286, 292. Only cost deposits *paid* and documented transcript expenses may be taxed on appeal. *Sunrizon Homes, Inc. v. American Guar, Inv. Corp.*, 1988 OK 145, 782 P.2d 103.

Should the appellants prevail on remand by recovering a judgment and be allowed a counsel-fee award based on the provisions of Section 5 of the Agreement in contest, they shall then also be entitled to an allowance for the reasonable value of legal services secured in this appeal. *Carpet World, Inc. v. Riddles*, 1987 OK 42, 737 P.2d 939, 942. Appellants may not succeed by invoking the provisions of 12 O.S. 1991 § 936, 71, 71 O.S. 1991 § 408(i), or 15 O.S. 1991 § 276. None of the cited statutes applies to this controversy over unpaid assessments allegedly due from the employers who are group members. Motion to secure from this court an appeal-related counsel-fee award is hence denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE ON THIS 9TH DAY OF MARCH, 1998.

/s/ Yvonne Kauger
CHIEF JUSTICE

Kauger, C.J., Summers, V.C.J., Hodges, Simms, Opala, and Wat, JJ., concur;
Lavender, Hargrave, and Wilson, JJ., dissent.

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

SECURITIES ACT OF 1933 (15 U.S.C. § 77A ET SEQ.)

15 U.S.C. § 77e. Prohibitions relating to interstate commerce and the mails

(a) Sale or delivery after sale of unregistered securities

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) Necessity of prospectus meeting requirements of section 77j of this title

It shall be unlawful for any person, directly or indirectly-

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) Necessity of filing registration statement

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

15 U.S.C. § 77l.* Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who –

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2) of this section, if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) of this section represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

*Note: this is the version of the statute now in effect. Although this statute has undergone amendment during the period relevant here, the pertinent language in subsection (a) has remained unchanged.

15 U.S.C. § 77j. Information required in prospectus

(a) Information in registration statement; documents not required

Except to the extent otherwise permitted or required pursuant to this subsection or subsections (c), (d), or (e) of this section –

(1) a prospectus relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of schedule A of section 77aa of this title;

(2) a prospectus relating to a security issued by a foreign government or political subdivision thereof shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of schedule B of section 77aa of this title;

(3) notwithstanding the provisions of paragraphs (1) and (2) of this subsection when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense;

(4) there may be omitted from any prospectus any of the information required under this subsection which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

* * *

(c) Additional information required by rules and regulations

Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(d) Classification of prospectuses

In the exercise of its powers under subsections (a), (b), or (c) of this section, the Commission shall have

authority to classify prospectuses according to the nature and circumstances of their use or the nature of the security, issue, issuer, or otherwise, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate and consistent with the public interest and the protection of investors.

(e) Information in conspicuous part of prospectus

The statements or information required to be included in a prospectus by or under authority of subsections (a), (b), (c), or (d) of this section, when written, shall be placed in a conspicuous part of the prospectus and, except as otherwise permitted by rules or regulations, in type as large as that used generally in the body of the prospectus.

MCCARRAN-FERGUSON ACT

15 U.S.C. § 1012 Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State Regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the

purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Oklahoma Securities Act

(Oklahoma Statutes, Supplement 1997, Title 71*)

§ 301. Registration Requirement

It is unlawful for any person to offer or sell any security in this state unless:

(1) it is registered under this act or the security or transaction is exempted under Section 401 of this title; or

(2) it is a federal covered security.

*Note: This is the version of the statute now in effect. Although this statute has undergone amendment during the period relevant here to add Subdivision (2), the pertinent language contained in what is now Subdivision (1) has remained unchanged.

Oklahoma Statutes, Supplement 1997, Title 71*

§ 408. Civil liabilities

(a) Any person who:

(1) offers or sells a security in violation of Sections 201(a), 301, or 404(b) of this title, or of any rule or order under Section 402 of this title, or of any condition imposed under Sections 304(d), 305(f), or 305(g) of this title; or

(2) offers or sells or purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the other party not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable:

(A) in the case of an offer or sale of a security, to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at ten percent (10%) per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender, less the value of the security when the buyer disposed of it, and interest at ten percent (10%) per year from the date of disposition; or

* * *

(i) No person who has made or engaged in the performance of any contract in violation of any provision

of this title or any rule or order promulgated thereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract. Any defendant who prevails in an action brought under paragraph (1) or (2) of subsection (a) or paragraph (1) or (2) of subsection (c) of this section may recover his reasonable attorneys' fees and costs in the action from the plaintiff if the court, in its discretion, determines that the action was without substantial merit. Any plaintiff who prevails in an action brought under paragraph (1) or (2) of subsection (a) or paragraph (1) or (2) of subsection (c) of this section may recover his reasonable attorneys' fees and costs in the action from the defendant.

* * *

*Note: This is the version of the statute now in effect. Although this statute has undergone amendment during the period relevant here, the pertinent language has remained unchanged.

Oklahoma Statutes, Supplement 1996 § 149.1*

§ 149.1. Group self-insurers

A. The Workers' Compensation Court shall adopt rules permitting two or more employers not otherwise subject to the provisions of Section 2b of this title to pool together liabilities under this act for the purpose of qualifying as a group self-insurer and each such employer shall be classified as a self-insurer.

B. The Court shall approve the distribution of an undistributed policyholders' surplus of a Workers' Compensation Self-Insurance Program if the Program complies with the following criteria:

1. Has been in business for at least five (5) years;

2. Has its financial statements audited by a public accounting firm which audits at least one corporate client which has assets in excess of One Billion Dollars ($1,000,000,000.00) and on which the accounting firm has issued an unqualified opinion as to the fair presentation of the financial position of the Program showing adequate solvency and reserves; and

3. Is in compliance with the provisions of this title and all other regulations as required by the Court.

C. A group self-insurer created pursuant to this section either prior to or after the effective date of this act shall not be subject to the provisions of the Oklahoma Securities Act.

*Note: This is the current version of the statute. Subsection C was added by amendment effective November 1, 1996, *after* (1) the Trial Court Judgment in favor of the YWCA Petitioners, and (2) the filing of Petitioner Colbert's Counterclaim.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

SELF INSURORS MANAGEMENT GROUP,	)	
Plaintiff,	)	Case No.
v.	)	CJ-89-9984
THE YWCA, et al., on behalf of themselves and all similarly situated members/shareholders of Self Insurors Management Group,	)	
Third-Party Plaintiffs,	)	
v.	)	
CHRIS STURM, individually,	)	
Third Party Defendant.	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT – THE "AGREEMENTS" ARE UNREGISTERED SECURITIES AND VOID

COME NOW the undersigned Defendants The YWCA of Oklahoma City, et al. ("Defendants") and hereby move for summary judgment to be rendered in their favor and against Plaintiff Self Insurors Management Group ("Plaintiff"). The undersigned Defendants, members of the Plaintiff organization, were holders of an unregistered security under the laws of the State of Oklahoma and the Federal Securities laws in that the Application for Membership, Indemnity Agreement and Power of Attorney (attached hereto as **Exhibit 1**) clearly constitutes

a security under the law and is undisputed that *it was not registered* as a security by the Plaintiff or any other party.

* * *

UNDISPUTED MATERIAL FACTS:

* * *

3. **NEW EVIDENCE. The Agreements were solicited with an offering circular**, an example of which is attached hereto as **Exhibit 2**, which states "We invite your inquiry today. In today's climate of constantly increasing costs in all phases of business overhead, SIMG offers a real and substantial savings, along with professional claims, servicing to the qualified employer. For additional information, please phone or write: Self Insurors Management Group, P.O. Box 3880.";

4. The offering circular (attached hereto as **Exhibit 2**) promises **$$$$$$ YOUR PREMIUMS PLUS INVESTMENT INCOME RETURNED TO YOU!**;

5. The Agreements (attached hereto as **Exhibit 1**) were never registered as securities with the Oklahoma Securities Commission or the SEC. (See previous admission by the Plaintiff, Page 4 of the Response filed by SIMG on or about December 12, 1990, attached hereto as **Exhibit 3**). Complete financial information as would be required by an offering prospectus was not furnished to prospective members for review prior to signing the membership Agreements. (See Affidavits attached hereto as **Exhibit 4**);

6. The undersigned Defendants, as indicated by the attached Affidavits (**Exhibit 4**), were not informed of the

following at the time of the execution of the membership Agreements, to-wit:

a. Names of other members;

b. Financial solvency of other members;

c. Type of industry or commerce other members were involved in;

d. The amounts of commission paid to insurance agents and the group administrator;

e. Financial status of the association at the time the members executed the agreement; and

f. The reserve practice and policies of the Plaintiff association.

7. The offering circular was used by Mark Insurance Agency and others to solicit "members" for the Plaintiff association. (See **Exhibit 5** attached hereto);

8. The Plaintiff's Amended Petition alleges the Defendants are "indebted" to the Plaintiff for an amount in excess of $2 million. (See Amended Petition filed herein).

ARGUMENTS AND AUTHORITIES

Introduction

This action is now an attempt by the Plaintiff to collect a money judgment in excess of $2 million under its Amended Petition jointly and severally against each of the undersigned Defendants, all of whom are "members" of the Plaintiff association organized pursuant to its Article of Association as a "non-stock" association. The administrator of the Plaintiff organization and "control

person" under definitions of securities laws under federal and state regulation is Chris Sturm.

* * *

PROPOSITION I: THE AGREEMENTS ARE SECURITIES.

By both state and federal government, certain laws have been enacted to protect the general public against certain types of wily planners and schemers who would seek separate unsophisticated or unsuspecting persons from their money and are easy prey for such persons. There is absolutely no question that the Agreements executed between the Plaintiff and the Defendants (**Exhibit 1**) fall within the definition of security pursuant to 71 Okla. State. § 2 (last amended 1992) as follows:

> **(16) investment of money or money's worth including goods furnished and/or services performed in the risk capital of a venture with the expectation of some benefit to the investor where the investor has no direct control over the investment or policy decision of the venture; . . .**

* * *

A brief review of the economic arrangements outlined in the offering circular (**Exhibit 2**) and the Agreement (**Exhibit 1**) clearly reveal that the Defendants' premium dollars (risk capital) was *in the direct control of the Administrator, Chris Sturm, and the Board of Supervisors.* After payment, the Defendants lost all control whatsoever over the premium dollars.

In addition, federal definition of the term "security" under the Securities Act of 1933, 15 U.S.C. § 77(b), has been very broadly construed to include **participation in any agreement which creates a common economic enterprise**. *McGill v. American Land & Exploration Company*, 776 F.2d 923 (10th Cir. 1985), states:

> [t]he definition of a security contract is to be established pursuant to **the economic reality of the situation**, not merely what the parties have chosen to call the agreement itself. [Emphasis added]

Also, see *The Securities & Exchange Commission v. American Commodity, Inc.*, 546 F.2d 1361 (10th Cir. 1976), which holds that the agreement in question did subject the party to risk over which he had no control and when the outer structure of the arrangement was pierced, it is clear that *it was indeed a security as the Act defines that term*. Other cases, including *Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd.*, 544 F.2d 1059 (10th Cir. 1976), refer to *SEC v. Howey Co.*, 328 U.S. 293 (1946), which states:

> [t]o determine the existence of a security **the Court should apply a flexible, rather than a static, principal, one capable of adaption to meet the countless invariable schemes devised by those who seek to promote the use of other's money on the promise of holding out of profit**. [Emphasis added]

It is clear from the offering circular (**Exhibit 2**) that the Defendants were led to expect a profit in the enterprise. Even though the Defendants entered into a contract

with the expectation [sic] other benefits (worker's compensation coverage), the existence of another benefit does not remove the sale from the coverage of the Securities Act. See *Lowery v. Ford Hill Investment Co.*, 556 P.2d 1201 (Colo. 1976).

Further, the Agreements clearly meet the test of "**investment contract**" defined under 71 Okla. State. § 2(11). The Oklahoma Court of Criminal Appeals in *Probst v. State*, 807 P.2d 279 at 284 (Okla. Cr. 1991), relied on the case of *Securities and Exchange Commission v. Howey, supra*, as the authority to determine the elements of investment contracts, to-wit: "(1) an investment; (2) in a common enterprise; (3) with the expectation of a profit through the efforts of others." The Court, in *Probst*, further states, at p. 285, "[t]his Court could go on and on as to types of investments but clearly the modern trend in holding an investment to be a security has now to do with the actual management. This Court specifically adopts the 'substantial' or managerial approach rather than the 'solely' approach."

* * *

If the investor does not share in critical management decisions, he is entitled to protection of the Securities Act, to-wit:

> [t]hese Acts were not enacted to regulate all investments, only those investments where the investor remains passive, turning his capital over to another to employ. **In such case, registration provisions are geared to seeing that the investor has sufficient information about the project in which he is asked to invest and about the people to whom he is entrusting his**

> **capital to make an intelligent investment decision**. [Emphasis added] Professor Joseph Long, *State Securities Regulation – An Overview*, 32 Okl.L.Rev. 541, 569-70 (1979).

Therefore, as amply illustrated hereinabove, the Agreements, when accompanying by the offering circular (**Exhibit 2**), clearly constitute securities which were not registered, nor was sufficient information given to the Defendant members within which to make an informed decision.

* * *

PROPOSITION II: IS THE PLAINTIFF EXEMPT FROM SECURITIES REGISTRATION?

Since it is undisputed that the Plaintiff never registered the Agreements with the Oklahoma Securities Commission or the SEC, Plaintiff must now prove that it is exempt from registration. Title 21, § 401(E) states: "[i]n any proceeding pursuant to the provisions of the Oklahoma Securities Act, the burden of proving an exemption or an exception from definition is upon the person claiming it." This again was reiterated by the Oklahoma Court of Appeals in *Howell v. Ballard, supra*, at p. 129: "[e]xemption from registration is an affirmative defense. The burden of proving same is on appellants." The Court further states that all elements of the exemption must be proven. See *Lambrecht v. Bartiett*, 656 P. 2d 269 (Okra. 1982). **Because of a non-charitable purpose, the Plaintiff does not meet any exception or exemption based upon a non-profit definition.** See 15 U.S.C. § 77(C)(4).

* * *

EVEN IF IT WERE EXEMPT, THE PLAINTIFF FAILED TO COMPLY WITH DISCLOSURE REQUIREMENTS.

* * *

Any reasonable person would consider the financial facts never furnished to the members, as shown by the attached Affidavits **(Exhibit 4)**, to be important information for the Defendants to have in order to be half-way informed before executing the Agreements with the Plaintiff. Any information that *could* influence the members' decision constitutes information that should be disclosed to the Defendants. See *SEC v. Switzer*, 590 F.Supp. 756 (D.C. Okla. 1984).

The Plaintiff's Amended Petition in the instant proceeding is an attempt to enforce an indebtedness in excess of $2 million against the Defendants jointly and severally. **It cannot be disputed that financial condition of the Plaintiff and all companies comprising the membership would be absolutely critical information to the Defendants' decision at the time they executed the Membership Application.**

CONCLUSION

* * *

How on earth could the Defendants not be entitled to protection of the securities laws regarding disclosure of financial information if, by signing the Agreements as alleged by the Plaintiff, they could become indebted for more than $2 million? Quite an investment scheme! The

Defendants could pay hundreds of thousands of dollars for worker's compensation insurance and never receive the "investment" money back promised by the offering circular and later become "indebted" to the Plaintiff for $2.5 million, **each**.

The Plaintiff will obviously contend that these Defendants were not entitled to protection of any securities laws, i.e., **they were *not*** entitled to disclosure of any financial information before entering into this investment. This kind of scheme, a trap for the unwary small business owner, must be stopped and *it must be stopped now*.

* * *

WHEREFORE, in consideration of the premises, the undersigned Defendants The YWCA of Oklahoma City, Inc., et al. pray that summary judgment on Plaintiff Self Insurors Management Group's Amended Petition be entered in favor of the undersigned Defendants and against the Plaintiff, that the Applications/Agreements be adjudicated and unregistered securities and, therefore, void, unlawful and not providing legal grounds for the "indebtedness" sought to be collected by the Plaintiff, and for such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

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By: /s/ _____

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,	)	
Plaintiff,	)	
vs.	)	Case No.
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,	)	CJ-96-5268-65
Defendant and Third Party Plaintiff,	)	
vs.	)	
DAVID DANK,	)	
Third Party Defendant.	)	

COLBERT NURSING HOME, INC.'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF OESG; AND BRIEF IN SUPPORT

The defendant Colbert Nursing Home, Inc. ("Colbert"), respectfully submits this Brief in Support of its Motion for Summary Judgment and Response in Opposition to the Motion For Summary Judgment of Oklahoma Employers Safety Group, S.I.A. ("OESG"), and in support of such Motion shows the Court as follows:

* * *

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF OESG

PROPOSITION I: The Interests in OESG Are Securities

The sales literature used to sell interests in OESG, consisting of the Application and Contract For Membership and Indemnity Agreement and Power of Attorney attached as Exhibit "A" to OESG's Motion For Summary Judgment, and Exhibit "G", along with Rule 3 of the Rules of the Administrator of the Workers Compensation Court (attached as Exhibit "E") and the Articles of Association (Exhibit "F") make it clear that purchasing an interest in OESG entails payment of funds to OESG not only for insurance coverage, but for administrative fees and other items described therein, as well as an obligation to pay additional amounts based upon a lack of profitability of OESG, and the possibility that if managed properly by management of OESG, the payment of excess monies in the way of dividends. See specifically the Rules of The Administrator of the Workers Compensation Court, Rule 3, Sections 3 (b)(d)(i)(k)(l) and (m), and Section 12 (which provides the rules relating to collection of monies from purchasers of interests, distribution of surplus monies and in the event of a deficit, assessment or other "call" feature wherein additional monies may be required of members in the event the performance of OESG is not adequately covered by previous collections).

Subproposition I.(a): The Interests Are Securities Under The Oklahoma Securities Act

The Oklahoma Securities Act at 71 O.S. § 2(u) states a security means *any*; (2) stock; (7) certificate of interest or participation in any profit-sharing agreement; (11) investment contract; (15) investment of money or money's worth including goods furnished and/or services performed in the risk capital of a venture with the expectation of some benefit to the investor where the investor has no direct control over the investment or policy of the venture; (16) in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing; among other definitions in Title 71. The interests purchased in OESG by Colbert are clearly securities under each of these definitions. A copy of Title 71, Section 2 is attached hereto as Exhibit "K".

The above analysis under the Oklahoma Security Act is re-enforced by recent legislation in Oklahoma which purports to remove investments structured as self insurance associations like OESG and others from the reach of the Oklahoma Securities Act. See Oklahoma Session Law service, Volume 6, Chapter 363, Section 12, amending 85 O.S. 1991, § 149.1 at "C" to wit:

> "C. A group self-insurer created pursuant to this section either prior to or after the effective date of this Act shall not be subject to the provisions of the Oklahoma Securities Act."

The effective date of this purported amendment is November 1, 1996. See Section 20. Copies of this purported new legislation are attached at Exhibit "L".

The fact that the Legislature realized these were securities and desired to remove them from the reach of the Securities Laws in and of itself proves the securities status of the interests in OESG. Colbert filed its Counterclaim relating to the securities status of the investments prior to the effective date of the legislation and accordingly may assert the Securities Laws violations as an affirmative defense and a counterclaim. Further, as the Court is aware through its hearing of the case styled *Self-Insurors Managements Group v. 99 A Training Center, Inc. et al.*, Case No. CJ-89-9984 in the District Court in and for Oklahoma County, in which Your Honor determined the securities status of an association formed and operated in identical aspects with OESG, and which is presently on appeal to the Supreme Court in a case styled *Self-Insurers Management Group v. The YWCA of Oklahoma City, et al.*, Case No. 86718 in the Supreme Court of the State of Oklahoma, both the securities status of self-insured associations such as OESG and SIMG, and the effect of the legislation described above are being reviewed by the Oklahoma Supreme Court. Colbert respectfully requests this Court to take judicial notice of the proceedings described herein.

Subproposition I(B): Interests In OESG Are Securities Under the Securities Act of 1933

The Securities Act of 1993 in Section 2 provides that the term "security" means, among other things, any

stock, certificate of interest or participation in any profit-sharing agreement, investment contract, voting-trust certificate, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. 15 U.S.C. § 77b.(1). A copy of that statute is attached hereto as Exhibit "M".

Unlike the purported new legislation referenced above in Subproposition I.A., the Oklahoma Legislature did not choose to attempt to exclude investments in interests such as OESG or SIMG from the purview of the Federal Securities Laws.

PROPOSITION II: The Securities Are Not Registered With The Oklahoma Department of Securities Or The Securities and Exchange Commission

Attached hereto as Exhibit "H" is an affidavit from Kenneth Maillard of the Oklahoma Department of Securities indicating that interests in OESG are not registered as securities with the Oklahoma Department of Securities.

In Colbert's Affirmative Defenses and Counterclaim Colbert seeks to cancel the Application, and Indemnity Agreement and Power of Attorney which it executed pursuant to its purchase of the securities for two reasons, one being that the securities were not registered with the Oklahoma Department of Securities or the Securities and Exchange Commission and as a result, Colbert did not receive the disclosures it would have received had the securities been registered. Attached hereto is Exhibit "N"

is Schedule A to the Securities Act of 1933 which includes some of the information which is required to be furnished to a purchaser of securities when a registration statement has been filed.

Section 301 of the Oklahoma Act provides in part, that it is " . . . unlawful for any person to offer or sell any security in this state unless (1) it is registered under this Act . . . ". Any person who offers or sells a security in violation of Section 301 of the Oklahoma Act is liable to the person buying the security for the consideration paid, together with interest at 10% per year from the date of payment, costs and reasonable attorneys fees. Section 408(a)(1) of the Oklahoma Act. Further, under 71 O.S. § 408(i) provides "No person who has made or engaged in the performance of any contract in violation of any provision of this Title or any rule or order promulgated thereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract. Here, OESG seeks additional funds in excess of those already paid by Colbert under a contract which is clearly in violation of Title 71. The contract cannot be enforced.

Accordingly, OESG may not assert any suits whatsoever under the Exhibit "A" Application and Contract For Membership or Indemnity Agreement and Power of Attorney and Colbert moves the Court for such a judgment.

Since the OESG investments are securities, and were not registered under the Oklahoma Act, Colbert is entitled to cancel the securities purchase and may also, if it

desires, recover the entire investment, plus interest, costs and attorneys fees under Section 408(a)(1) of the Oklahoma Act. Colbert is also entitled to recover such sums from every person who offered or sold the securities, and from every person who directly or indirectly controlled any such person, among others. Sections 408(a)(1) and 408(b) of the Oklahoma Act. This would include, for example, David Dank who unquestionably controlled OESG during the years of investment and operation.

The Securities Act of 1933 has similar remedies under Section 5 (15 U.S.C. § 77(e) and § 12(1) (15 U.S.C. 77l(1)) and Section 11(e) of the 1933 Act (15 U.S.C. § 77k(e)).

* * *

Respectfully submitted,

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,	)	
Plaintiff,	)	Case No.
vs.	)	CJ-96-5268-65
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,	)	
Defendant and Third-Party Plaintiff,	)	
vs.	)	
DAVID DANK,	)	
Third Party Defendant.	)	

COLBERT NURSING HOME, INC.'S REPLY TO RESPONSE OF OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.'S RESPONSE TO COLBERT NURSING HOME, INC.'S MOTION FOR SUMMARY JUDGMENT AND REPLY

Colbert Nursing Home, Inc. ("Colbert") replies to Oklahoma Employers Safety Group, S.I.A's ("OESG") Response to Colbert's Motion For Summary Judgment and other matters filed by OESG December 18, 1996.

Colbert incorporates by reference its Motion for Summary Judgment and Response in Opposition to Motion For Summary Judgment of OESG.

* * *

PROPOSITION I: THE INTERESTS IN OESG ARE SECURITIES

In response to this Colbert argument OESG claims that OESG is not subject to the provisions of the Oklahoma Securities Act (page 4 of OESG Response) and that OESG is not subject to the provisions of the Federal Securities (sic.), (page 5 of the OESG Brief). OESG thus does not argue that the interests are not securities, just that they are somehow "exempt".

Colbert has already argued the inapplicability of the new Oklahoma legislation effective November 1 of this year, and will rely on its Brief in chief as to the inapplicability, non-retroactively [sic] of the Statute, its effective date, and that it can not destroy an existing defense in contravention of the Oklahoma Constitution, Article 5, § 54.

OESG's second argument is that this is merely an insurance contract between an insurance company and an insured. However, this is not a contract for insurance only, this is a contract for participation in an insurance company with ownership attributes thereto. For example, when a person purchases health insurance does that person also receive voting rights with respect to the provider of the health insurance? Of course not, and that is one distinction between participating in an insurance company through a membership or ownership position as in OESG, versus a straight insurance contract wherein a specified dollar amount is paid for the insurance coverage.

That of course highlights the next argument and that is, in an insurance policy not subject to the securities laws

a premium is paid and insurance coverage is provided, but that is it. On the other hand, participation in an insurance company such as OESG includes the possibility that in addition to the amounts paid initially as "premiums", the participant can be billed for assessments if the venture is unsuccessful, or may receive dividends if the venture is successfully managed by management. This is not something an insured under a straight insurance contract receives, and it is only straight insurance contracts that are not subject to the securities laws under the "exemptions" argued by OESG.

OESG next argues what the ultimate purpose of the agreement between the parties is, but Colbert certainly asserts that the purpose is clearly to participate in an insurance company that was supposed to be professionally managed. The cite to *Am. Mut. Reinsurance v. Calvert Fire Insurance Co.*, 367 N. E. 2nd 104, 109 (Ill. Po. App. 1977) is not authority (an Illinois Appellant Court decision) and involved litigation between *2 insurance companies* regarding an insurance contract. The instant action involves an insurance company and essentially a shareholder that is not an insurance company, Colbert. The relationship between Colbert and the insurance company it invested in is between member/shareholder and entity. The relationship in the *American Mutual Reinsurance* case is between 2 insurance companies and is therefore factually distinguishable. There is no reinsurance agreement between Colbert and OESG. Unlike the parties in *American Mutual Insurance Company*, both of which were in the insurance business, Colbert clearly is not in the insurance business. See page 108. At page 110 it is important to the Illinois Appellate Court that "Amreco agreed to pay a *set*

premium for obtaining Calvert's commitment. That *premium would not vary in any amount in that, unlike profits derived from an investment, Calvert's income from premiums was fixed by the contract"*. This is exactly the opposite of Colbert's position in its relationship with OESG. It is absolutely clear that the documents allow additional billing for losses sustained in the business and payment of dividends should a profit be derived from the investment. As to Colbert, there is no fixed payment and there is no fixed return. *American Mutual Reinsurance* and its references to the McCarran-Ferguson Act are clearly distinguishable factually.

OESG also cites *F.T.C. v. National Casualty Co.*, 357 U.S. 560, 78 F.Ct. [sic] 1260, (1958) but that adds nothing to OESG's argument and simply reinforces the fact that all of the parties in these cases are insurance companies and of course insurance companies are regulated under insurance laws that are designed to protect them. Conversely, Colbert is not an insurance company and the protections provided by insurance laws are designed to protect insurance companies and injured workers, not investors in the insurance companies and the relationship between an investor and the insurance company in which it invests is regulated under the securities laws, not the insurance laws. This case dealt with advertising practices of insurance companies. OESG has not offered a case where the Supreme Court has withdrawn from the Securities and Exchange Commission its authority to protect an investor in an insurance company and instead relegated that authority to an insurance commissioner somewhere. Accordingly, the rules of Workers Compensation Court referred to in the Brief at page 6 only protect the

injured workers, to make sure that in the event of a deficit, the financial statement of the investors will be strong enough to cover the pooled liability in this case for in excess of 200 investor employers. It is not designed in any fashion to protect the investors.

The arguments referred to above are also applicable to the cite of OESG to 15 U.S.C. 77C(a)(8) because again this is not just an insurance policy issued by a company, it is an investment in the company itself because of the participation in profit and loss which is geared at least in part to third party management, and in this case, Colbert never even had an opportunity to vote on management. OESG's cite to *American Deposit Corp. v. Schacht*, 887 F. Supp. 1066 (N.D. Ill. 1995), a northern district of Illinois District Court case is not persuasive and again is distinguishable because this is not a straight policy of insurance. *American Deposit* is also inapplicable because it deals with the relationship between a national bank and an insurance commissioner, and not an investor in the national bank with respect to his relationship in the national bank.

Actually, *American Deposit* stands for the proposition that a packaged offer, in that case a "retirement CD", was in reality an insurance annuity, and supports Colbert's contention that the investment offered by OESG of insurance and participation in profit and loss of a company with 200 investors packaged together is not just an insurance policy but an investment constituting a security.

Accordingly, as to Colbert's Proposition I, the interests are securities and they are not exempted or otherwise not classified as such by virtue of the arguments set out

in OESG's Response Brief. Accordingly, the interests are securities under both the Oklahoma Securities Act and the Securities Act of 1933.

PROPOSITION II: THE SECURITIES ARE NOT REGISTERED WITH THE OKLAHOMA DEPARTMENT OF SECURITIES OR THE SECURITIES AND EXCHANGE COMMISSION

OESG conceeds this argument by not arguing it and the Affidavits obtained from the Oklahoma Department of Securities and the Securities and Exchange Commission as Exhibits "H" and "H-2" are conclusive. The securities are not and have never been registered.

* * *

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STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,	)	
Plaintiff,	)	Case No.
vs.	)	CJ-96-5268-65
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,	)	
Defendant and Third-Party Plaintiff,	)	
vs.	)	
DAVID DANK,	)	
Third Party Defendant.	)	

COLBERT NURSING HOME, INC.'S REPLY TO OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.'S SUPPLEMENTAL RESPONSE FILED JANUARY 7, 1997

Employers Safety Group, S.I.A ("OESG") has filed another Brief (the "January 7, 1997 Brief") relating to the Motions For Summary Judgment of each of the parties. It was the understanding of counsel for Colbert that briefing was completed pursuant to order of the Court, with Colbert's December 20, 1996 Brief, but in any event, Colbert will reply to the January 7, 1997 Brief. Inasmuch as OESG does not respond to most of the arguments and evidence offered by Colbert in its Brief filed December 20, 1996, and only addresses three substantive issues, those are the only issues Colbert will address in this Reply.

With respect to the narrative on David Dank contained in this particular OESG Brief, since it is not supported by admissible evidence it is merely unsubstantiated counsel argument and must be disregarded for Rule 13 purposes.

OESG IS SUBJECT TO THE OKLAHOMA AND FEDERAL SECURITIES LAWS

This issue is addressed in Propositions I and II of Colbert's Briefs. OESG does not add any new argument but basically rehashes its argument that interests in the investment are nothing more than ordinary ("straight") contracts of insurance (and therefore fit in the exemption or exclusion from the securities laws for ordinary ("straight") insurance contracts. Apparently, OESG does not understand the concept, but it is simple. When a "straight" insurance contract is purchased the insured pays a set premium for an agreed upon amount of coverage. In contrast, when was the last time an insurance policy gave the holder (a) the right to vote on management of the insurance company and (b) dividends if the company operated at a profit or (c) an assessment (payment of undetermined additional amounts) if the company operated at a loss? That is the difference between a "straight" insurance contract, and the investment in the case at bar. As demonstrated in Colbert's Brief, and as anyone who has ever purchased an insurance policy is clearly aware, these interests in OESG are not simply insurance by the payment of a premium, but are participation in an insurance company on an open ended basis. As pointed out in Colbert's Brief the consideration paid by purchasers of interests in OESG consists not only of

amounts computed on the basis of the insurance coverage, but also the promise to pay for any shortfalls in operation of the Association, or to receive dividends back based on profitable performance of the investment. When a person purchases "straight" insurance through the state insurance fund, they do not sign up for these additional risks (and costs) or potential benefits and (and rewards), and they do not have the right to elect the insurance commissioner.

Similarly, when an insurance policy is purchased the holder of the insurance policy does not have the right to *vote* on management of the issuing company because it is not a shareholder in that company. Here, voting rights clearly indicate securities status because the purpose of the voting rights is to give the individuals that invest, but that must rely on management to make a profit so that they will not sustain additional loss in the way of assessments, the right to select that management based on performance of management. Of course, annual elections did not happen, (OESG has failed to respond to Colbert's evidence and arguments relating to failure to have elections), and nothing further is necessary in this Brief with respect to that issue.

OESG attempts to boot strap applicability of 85 O.S. §149.1 as described in the earlier Briefs of the parties by stating that since Colbert never had a defense because OESG sold only a "straight" insurance contract, no defense has been destroyed. This simplified argument to wire around the Constitution of the State of Oklahoma does not merit any further arguments except to say that clearly the Legislature felt these interests were securities

and attempted to exclude them from the Oklahoma Securities Act. That attempt fails for the reasons stated in Colbert's earlier Briefs including the Oklahoma constitutional argument, and of course is not binding with respect to the Federal Securities Laws.

* * *

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IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,	)	
Plaintiff/Appellant,	)	No. 88,818
vs.	)	(Companion
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,	)	With No. 86,718)
Defendant/Appellee, and Third-Party Plaintiff,	)	
vs.	)	
DAVID DANK,	)	
Third Party Defendant.	)	

PETITION FOR REHEARING AND BRIEF IN SUPPORT

The Defendant/Appellee Colbert Nursing Home, Inc., d/b/a Southern Pointe Living Center, an Oklahoma corporation ("Colbert") petitions the Court for rehearing relating to the Opinion filed in this Appeal July 8, 1997. Colbert respectfully requests that the July 8 opinion be reviewed to correct errors made in the Opinion as noted below.

Colbert's claims included state securities laws violations, federal securities laws violations, and Oklahoma Employers Safety Group's failure to comply with Workers Compensation Court Rules *and its own Amended Constitution and By-laws* (see document number 6 in the Record on Accelerated Appeal ("ROA") and in particular page 3 paragraph 11 regarding failure to provide notice with

respect to elections of directors or to conduct such elections, page 5 under the side caption "OESG Fact Number 3", page 13, first and second full paragraphs, and page 14 Proposition IV; and Exhibit "F", p. 1-2.) The synopsis of the Opinion and the Opinion at p. 3, 4, 6 and 7 seem to indicate that the gist of OESG's argument was that because there were no elections *prior* to OESG's investment that constituted a material breach of the agreement. While that is partially correct, OESG's argument at the trial court level was there were *never any elections both before and during Colbert's participation in OESG*. Colbert also pointed out that during that time there were undisclosed deficits (both before and after Colbert's investment), which adversely reflect on management of the offering and directly impact on its investment. Elections of directors are the only way Colbert had to correct mismanagement of the investment. Second, even if one assumed that there were elections after Colbert became a member, OESG was still saddled with the deficits of prior years. Accordingly, the failure to disclose deficit status at the time of investment, along with the failure to conduct elections both before and during membership are material. Stated another way, why would the Workers Compensation Court Rules and OESG's Constitution and Bylaws (after amendment) require elections, if elections were not material? Also, purchasers of pure insurance do not receive the right to elect directors of the insurance company with which they purchase insurance.

There is no fact issue with respect to the fact that there has *never* been an election in OESG either before Colbert participated or during its participation. OESG has produced an in house generated document not signed or

verified by any person that purports to list some members from whom OESG obtained a proxy. See ROA Document 7, Exhibits G and H. *A proxy is not an election.* These documents do not even indicate whether there were enough proxies received to obtain the vote for any *proposed slate of directors.* No evidence is offered by OESG in the ROA that any *election* ever took place. On the other hand the Affidavit of Kelly Mitchell clearly indicates Colbert was never provided with notice of any such election. At the very least this is also a fact issue for remand to the trial court. Elections are important for several reasons including but not limited to the fact that deficits continued to accrue and exist in OESG and that deficits have accrued during the entire course of David Dank's administration. Deficits must be made up through increased premiums, which is what occurred when OESG assessed an additional "premium" that was approximately the same amount, again, as the OESG's original "premium" charged (original "premium" $76,006; additional "premium" $72,469, at See ROA Document No. 6, Exhibit "D".

Accordingly, OESG not only failed to comply with Workers Compensation Court Rules prior to November 10, 1993, but then did not follow its own Constitution and By-law amendment. This is supported by admissible evidence in the way of the Kelly Mitchell Affidavit attached to document 6 in the ROA as Exhibit "A", paragraph 5. The Court in the July 8 Opinion makes no finding regarding failure to conduct elections after Colbert's participation. At the very least the Court should remand this issue for trial. Recasting the second issue on page 4 of the July 8 Opinion in a manner limiting the election argument to

pre-participation by Colbert is erroneous because it limits Colbert's argument in a manner not consistent with the actual substance of Colbert's trial court argument.

Concerning the July 8 Opinion and its finding that the Oklahoma Securities Act is not available to Colbert as a defense in OESG's action, Colbert respectfully submits that because its participation in OESG was from August 25, 1994 to April 1, 1995 and from April 1, 1995 to March 1, 1996 and that the effective date of the Amendment to §149.1.C. of Title 85 was not effective until November 1, 1996, this ruling is an impermissible destruction of a defense that existed in favor of Colbert and is not permissible under the Constitution of the State of the [sic] Oklahoma or the United States Constitution. See ROA Document No. 8, p. 2, and Oklahoma Constitution Article 5, §54.

On page 5 of the Opinion under the side caption "Federal Securities Laws Do Not Apply To The Facts Of This Appeal" the opinion recites "Without citation of authority Colbert contends the Oklahoma Employers Safety Group violated Federal Securities Laws. We disagree." The citations to the Federal Securities Laws contained in Colbert's Trial Court Brief are found in Document 6 of the Record on Appeal at the following pages: page 9, first complete paragraph (cite to 15 U.S.C. §77b.(1). A copy of that Statute is attached as Exhibit "M" to that Brief; page 11, third complete paragraph (the Securities Act of 1933 has similar remedies under §5 (15 U.S.C. §77(e) and §12(1) (15 U.S.C. 77l(1)) and §11(e) of the 1933 Act (15 U.S.C. §77k(e)); page 12 at the bottom of the first complete paragraph (The Securities Act of 1933

provides for similar disclosure requirements in connection with the offer and sale of securities at §10 and §12(a)(2) (15 U.S.C. §77j and 77l(2)). As with the Oklahoma Act, controlling persons are also liable for the remedies provided. Section 15 (15 U.S.C. §770)). Furthermore, Schedule A of the Securities Act of 1933 (addressing disclosure requirements) is also cited on page 13 on the last line. Schedule A is also attached as an Exhibit to that Brief at Exhibit "N". Accordingly, Colbert did provide citations to authority with respect to its Federal Securities Act claims. Substantively, the claims are basically the same as to the State Securities Act, (failure to register the securities and material omissions and failures to disclose with respect to the sale of the Securities). The remedies are also basically the same, they are just found in The United States Code as opposed to Title 71 of the Oklahoma Statutes.

Colbert also respectfully believes this Court has also misconstrued the application of the McCarran-Ferguson Act with respect to regulation of insurance where the insurance is straight or "pure" insurance, versus an investment in an insurance company. *Federal Trade Commission v. National Casualty Co.*, 357 U.S. 560, 78 Supreme Court 1260, 2 L.Ed. 2d 1540 (1958) did not involve the relationship between a shareholder or other investor and the insurance company where the shareholder made an investment in that insurance company. Accordingly, it is factually distinguishable from the instant appeal.

The Court commented on page 6 of the July 8, 1997 Opinion that Colbert is not primarily an investor, and based on that made a determination that its status as an investor must be secondary to its responsibility as an

employer. The Court also applied the 1996 Amendment in §149.1.C, retroactively to Colbert's participation two years before the effective date to destroy the defense of the Oklahoma Securities Act. Colbert respectfully disagrees with these determinations by the Court and requests rehearing on that issue. While Colbert may be viewed to an extent as an employer regarding its own employees, it is *not* an employer as to the other 200 plus "members' of OESG (as to those members Colbert is extending its credit and financing the investment). When viewed in that perspective, Colbert is an investor relying on management to (1) professionally manage the investment, (2) accurately report the results of the investment, including its deficit status, and (3) conduct elections as required by law and the parties contract. At the time of investment in 1994 all parties had an established, legal procedure relating to their rights. OESG prepared an investment document which was required to be reviewed by the Workers Compensation Court to protect workers, and the Oklahoma Department of Securities and the Securities and Exchange Commission to protect investors. OESG failed to submit the proposal to the proper securities agencies. Under the rules of those securities agencies the deficits and election procedures should have been disclosed. Further, OESG failed to comply with the parties agreement regarding elections. OESG now seeks to double its premium.

Colbert respectfully requests that the Court review its July 8, 1997 Opinion and the arguments and authorities set out in Colbert's Briefs at the trial court level (and used in the accelerated Appeal), which are incorporated

herein by reference. The Trial Court's ruling should be upheld.

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SELF INSURORS MANAGEMENT GROUP,	)	
Plaintiff/Appellant,	)	Case No.
v.	)	86,718
THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, C & H POWER LINE, CHRIS HUNT WATER HAULING, and JOHN VANCE MOTORS,	)	
Defendants/Appellees.	)	

PETITION FOR REHEARING AND BRIEF IN SUPPORT

By *Opinion* filed July 8, 1997, this Court reversed the trial court's decision granting the Appellees summary judgment on grounds that:

1. The agreements between the parties hereto were unregistered securities, and could not therefore be enforced, and

2. The agreement was materially breached by the Appellant, who was seeking enforcement thereof, i.e. the

Appellant had failed to follow material provisions of the agreement requiring that the Rules of the Workers' Compensation Court be complied with, including a rule stating that there must be a "recognizable common purpose" between the members of any group forming an "association" for purposes of group "self-insurance" under 85 O.S. § 149.1.

The Appellees herein below illustrate that the record in the District Court supports this petition, i.e. that this Court's July 8, 1997 *Opinion* be withdrawn and that the District Court ruling, be affirmed, to wit::

1. This Court's July 8, 1997 Opinion improperly applies a substantive law in *"ex post facto"* manner which law was passed by the Oklahoma legislature *after* the subject District Court ruling, in violation of principles of due process and equal protection of the United States Constitution and Amendments thereto, as well as the Constitution of the State of Oklahoma and Amendments thereto.

2. This Court allows the laws of the State of Oklahoma (the enacted *"ex post facto"* law) to improperly preempt or "trump" Federal Securities law in an area which is specifically addressed by Federal Laws, i.e. the definition of security, rules and regulations governing the registration and issuance of securities, as well as laws governing procedure prohibiting the sale and distribution of unregistered securities within these United States.

PROPOSITION I

NO BILL OF ATTAINER OR EX POST FACTO LAW SHALL BE PASSED.[1]

This Court's July 8, 1997 *Opinion*, on page 5, clearly recognizes and relies upon 85 O.S. § 149.1(c), amended, 1996, subsequent to the ruling of the District Court, as follows:

> "A group self-insurer created pursuant to this section either prior to or after the effective date of this act shall not be subject to the provisions of the Oklahoma Securities Act."

This Court further, on pages 6 and 7 of the subject *Opinion*, erroneously characterizes this "subsequent" legislation as mere clarification, and in partial support, cites 85 O.S. § 61(b), amended in 1993, noting that an "employer . . . accepts joint and several liability. Such notice shall be submitted to the Workers' Compensation Court with application for membership." The Court fails to recognize that the subject agreements herein were entered into long before the referenced amendment to 85 O.S. § 61. Further, the *Opinion*, page 8, indicates that the amendment to 85 O.S. § 149.1 was not a clarification, but a matter of "establishing" policy.

The application of the *ex post facto* clause contained in both the Constitution of the United States, and our own Oklahoma Constitution[2] is based fundamentals [sic] to

---

[1] See Constitution of the United States, Section 9, Clause 3.

[2] Article 5, Section 52, " . . . After suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit."

the concept of constitutional liberty, and therefore protected by the due process clause of the fifth and fourteenth amendments. (See *McDonald v. Champion*, 962 F.2d 1455 (10th Cir. 1992) [Okl.], cert. denied 113 S.Ct. 256.

Additionally, the citizens of Oklahoma are further guaranteed that, "No person shall be deprived of life, liberty or property, without due process of law." See Article 2, Section 7 – Constitution of the State of Oklahoma). This Honorable Court held, in 1985, that the validity of a judgment in the District Court is governed by the law "in force when the judgment is entered". See *Timmons v. Royal Globe Ins. Co.*, 713 P.2d 589 at 594 (Okl. 1985). This rationale also applies to legislative criminal sentencing guidelines, which cannot be made "retroactive" to the disadvantage of a criminal defendant. See *U.S. v. Gerber*, 24 F.3d 93 at 96 (10th Cir. 1994) [Okl.]; *U.S. v. Tisdale*, 7 F.3d 957 at 965 (10th Cir. 1993) [Okl.].

Further, [after enacted] federal legislation is subject to the same test, as addressed by *Lennox v. Evans*, 87 F.3d 431 at 432 (10th Cir. 1996) [Okl.], citing to the United States Supreme Court, to wit:

> "As specified by the Supreme Court, a statute has 'retroactive effect' when applied to a case filed prior to passage of the new legislation if 'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.' " See *Landgraf v. U.S.I. Film Prods.*, 114 S.Ct. 1483 at 1505 (1994).

It would be difficult to logically argue that the Appellees herein were not adversely affected by the 1996 amendment to 85 O.S. § 149.1, as a "retroactive effect" under the *Landgraf* rationale. For the reasons, this Court should affirm the District Court's judgment herein.

PROPOSITION II

THIS COURT ERRONEOUSLY RELIED UPON ACTS OF THE OKLAHOMA LEGISLATURE TO "PREEMPT" FEDERAL SECURITIES LAW.

As argued in the trial court below (Record Item 5, page 1, Indexed to the District Court Record – *Defendant's Motion For Summary Judgment* – Filed July 31, 1995, *"The agreements are unregistered securities and void"*) the Appellees have stated that an agreement entitled "application for membership, indemnity agreement and power of attorney" was an unregistered security, not only under the laws of the State of Oklahoma, but Federal Securities laws as well.

In the same document, page 2 at Record Item 5, it was *undisputed* that the agreements were never registered as securities, either with the Oklahoma Securities Commission, or the Securities and Exchange Commission ("SEC"). Continuing on page 4 of this same Record Item 5, the Appellees argued, "The agreements themselves (Exhibit 1) are violative of the securities regulations laws of both the state and federal governments and, therefore, unlawful." The appellees thereafter proposed, on page 7 of Record Item 5, as follows:

> "In addition, federal definition of the term 'security' under the Securities Act of 1933, 15

U.S.C. § 77(b), has been very broadly construed to include participation in any agreement which creates a common economic enterprise. *McGill v. American Land & Exploration Company*, 776 F.2d 923 (10th Cir. 1985), states:

> [t]he definition of a security contract is to be established pursuant to the **economic reality of the situation,** not merely what the parties have chosen to call the agreement itself. [Emphasis added]

Also, see *The Securities & Exchange Commission v. American Commodity, Inc.*, 546 F.2d 1361 (10th Cir. 1976), which holds the agreement in question did subject the party to risk over which he had no control and when the outer structure of the arrangement was pierced, it is clear that *it was indeed a security as the Act defines that term.* Other cases, including *Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd.*, 544 F.2d 1059 (10th Cir. 1976), refer to *SEC v. Howey Co.*, 328 U.S. 293 (1946), which states:

> [t]o determine the existence of a security the Court should apply a flexible, rather than a static, principal, one capable of adaption to meet the countless invariable schemes devised by those who seek to promote the use of the other's money on the promise of holding out of profit.

It is clear from the offering circular (Exhibit 2) that the Defendants were led to expect a profit in the enterprise. Even though the Defendants entered into a contract with the expectation of other benefit (worker's compensation coverage), the existence of another benefit does not remove the sale from the coverage of the Securities Act. See *Lowery v. Ford Hill Investment Co.*, 556 P.2d 1201 (Colo.

1976)." Further, the Agreements clearly meet the test of an "investment contract" defined under 71 Okl. Stat. § 2(11). The Oklahoma Court of Criminal Appeals in *Probst v. State*, 807 P.2d 279 at 284 (Okla. Cr. 1991), relied on the case of *Securities and Exchange Commission v. Howey*, supra, as the authority to determine the elements of investment contracts, to-wit: '(1) an investment; (2) in a common enterprise; (3) with the expectation of a profit through the efforts of others.' The Court, in *Probst*, further states, at p. 285, '[t]his Court could go on and on as to types of investments but clearly the modern trend in holding an investment to be a security has now to do with the actual management. This Court specifically adopts the 'substantial' or managerial approach rather than the 'solely' approach.' "

Clearly, as shown above, the State of Oklahoma has relied upon Federal laws defining securities in prior cases. See also *SEC v. Switzer*, 590 F.Supp. 756 (W.D. Okl. 1984). As argued in the District Court (page 10 of Record Item 5), the Appellees clearly had shown that the agreements in questions were not entitled to a "non-profit" exception or exemption under federal law, referring to 15 U.S.C. § 77(c)(4).

Despite the District Court's finding that the subject agreements were securities, and despite the record showing these "agreements" to be [unregistered] securities under both State and Federal Securities laws, this Court's *Opinion* of July 8, 1997, makes no mention of how the "after enacted" amendment to Title 85 § 149.1 somehow "trumps" Federal Securities laws, as well as those of the State of Oklahoma. It is possible that this Court inadvertently failed to analyze the entire basis for the District

Court's *Opinion*, including state *and* Federal Securities laws.

Under 15 U.S.C. § 3901, *et seq.* Congress specifically addressed the status of membership in "reciprōcal insuror organizations" similar to the Appellant herein, and provided the [sic] that the ownership interest of members *would* be considered securities under § 77(q) of the Securities Act of 1933, and § 78(j) of the Securities Exchange Act of 1934.

State laws are *not* controlling in construing what is a "security" under 15 U.S.C. § 77(b), *et seq.*, which determination is clearly governed by federal law (in the event of a conflict). See *Farrell v. U.S.*, 321 F.2d 409 (9th Cir. 1963), cert. denied 84 S.Ct. 631. See also *Securities Exchange Commission v. Los Angeles Trust Deed and Mort. Exchange*, 186 F.Supp. 830 (S.D. Cal. 1960), modified on other grounds, 285 F.2d 162, cert. denied 81 S.Ct. 1095. In an appeal from Oklahoma District Court to the Tenth Circuit, it was held that despite protection under federal ERISA law, employees were *not* barred from invoking the Federal Securities Act to protect their interests in certain benefit plans. (*Uselton v. Commercial Loveless Motor Freight, Inc.*, 940 F.2d 564 (10th Cir. 1991) [Okl.], cert. denied 112 S.Ct. 598. This Court's *Opinion* deprives the Appellees the shelter of federal laws which were specifically designed to protect them.

The United States Supreme Court in *Howlett By and Through Howlett v. Rose*, 110 S.Ct. 2430, (1990), on remand 571 So.2d 29 has held " . . . supremacy clause forbids state courts to disassociate themselves from federal law

because of disagreement with its contents or refusal to recognize superior authority of its source."

Holloway v. Peat, Marwick, Mitchell & Co., 879 F.2d 772 at 785 (10th Cir. 1989) [Okl.], cert. granted and vacated *Peter Marwick Main & Co. v. Holloway*, 110 S.Ct. 1314 on remand 900 F.2d 1485 (10th Cir. 1990), cert. denied *KPMG Peat Marwick v. Holloway*, 111 S.Ct. 386, held that the State of Oklahoma could *not* displace the applicability of Federal Securities laws to issuers of passbook savings certificates, and " . . . **We find nothing in federal securities acts to indicate that Congress intended the states to displace the protections of Federal Securities laws . . .**" This Court's July 8, 1997 *Opinion* fails to support this principle.

The "agreements" stand as securities under pre-existing Oklahoma law. The *Opinion* fails to show how 85 O.S. § 149.1 somehow preempts or supersedes the Oklahoma statutory definition of security under 71 O.S. § 2, merely because it is later in time. The undisputed facts in showing the District Court clearly show the subject agreements fall within the definition of securities under the laws of the State of Oklahoma. The *Opinion* fails to address the [apparent] conflict between Oklahoma Securities laws and the new amendment to 85 O.S. § 149.1, other than by failing to mention the former.

PROPOSITION III

APPELLANTS MAY NOT ENFORCE AN AGREEMENT IT MATERIALLY BREACHED.

As shown on page 2 of Record Item 6 (undisputed facts No.s 3 through 5) [of the District Court record],

Section 3(b) of the Rules of the Workers' Compensation Court, was addressed. It was undisputed that the Appellees and other "members" of the Appellant organization were not engaged in the same or similar types of business and had no recognizable common purpose for associating. Further, pages 2 and 3 of Record Item 6, undisputed facts No. 6, clearly show that the Appellant pledged to abide by the above Rule(s) of the Workers' Compensation Court. This Court's *Opinion*, page 9, makes a finding that the above-noted "recognizable common purpose" includes those persons willing to take the risk of being self-insured in return for paying less for group self-insurance. If this construction is proper, what would be the purpose of Rule 3, Section 3(b)? Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137 at 174 (1803) held:

> "It cannot be presumed that any clause in the Constitution is intended to be without effect . . . "

It appears that this Court has construed Section 3(d) to the point to which it is "without effect".

Further, it was clearly shown in the undisputed facts that the Appellant pledged in the subject "agreement" to faithfully follow the by-laws of the organization requiring elections of a board of supervisors, and it did not. This issue was not before this Court at the time the July 8, 1997 *Opinion* was issued. Although raised by the Appellees below, this was not addressed in the decision and Journal Entry of the District Court being appealed herein.

The subject *Opinion* finding, as "a matter of law", that completely dissimilar businesses can be associated for purposes of group self-insurance, appears to usurp the

clear, expressed intent of the Oklahoma legislature. The power to express such an intent was assigned to the legislature in the Constitution of the State of Oklahoma, Article 5, Section 1, et seq.

CONCLUSION

For the reasons propounded above, Appellees below request this Honorable Court to grant this Petition For Rehearing, to withdraw the July 8, 1997 Opinion and affirm the decision of the District Court, and for such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

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By: /s/ _____

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Supreme Court, U.S.
FILED
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No. 97-1977

In The

Supreme Court of the United States

October Term, 1997

THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, INC., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, INC., JOHN VANCE MOTORS, INC., and TROY WESTNIDGE, INC.,

Petitioners,

v.

SELF-INSURERS' MANAGEMENT GROUP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENT, OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.'S, BRIEF IN OPPOSITION

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July 8, 1998

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LIST OF PARTIES

This is a Brief in Opposition to a Petition for Writ of Certiorari under Rule 15, wherein two judgments are sought to be reviewed on a writ of certiorari to the same Court and involve identical or closely related questions. The Petitioners in this case are: The YWCA of Oklahoma City, Century Martial Arts Supply, Inc., E & H Transfer, Inc., City Glass Co., Flip's Wine Bar & Trattoria, Inc., Mangum Brick Company, Ronnie's Signs, Inc., Dalmarc Enterprises Incorporated, Barbara J. Wilson, Oklahoma Steel & Wire, Inc., C & H Power Line Construction, Inc., Chris Hunt Water Hauling, Inc., John Vance Motors, Inc., Troy Westnidge, Inc. and Colbert Nursing Home, Inc. The Respondents in this case are Self Insurers' Management Group and Oklahoma Employers Safety Group, S.I.A. All parties before the Oklahoma Supreme Court are before this Court.

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STATEMENT OF THE CASE

Factual Background

Oklahoma Employer Safety Group ("OESG") is a self-insurance association approved by the Oklahoma Workers' Compensation Court and the provisions of title 85, section 149.1, et seq. of the Oklahoma Statutes. Under the authority of those statutes the State of Oklahoma's Workers' Compensation Court established an extensive set of rules (hereinafter "the rules") governing the formation and the conduct of self-insurance associations.[1] Both Oklahoma Employers Safety Group and Self-Insurers' Management Group are established, regulated and governed by the foregoing rules and statutes.

Businesses who wish to join a self-insurance association must sign a contract for membership known as an "Indemnity Agreement and Power of Attorney," the form of which must be approved by the Oklahoma Workers' Compensation Court. The rules require that all contracts contain provisions whereby members agree to assume and discharge, jointly and severally, all liability incurred by the association members under the Workers' Compensation Act; and grant the administrator of the association power of attorney to act for and bind the association in the performance of its operations.[2]

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[1] See Rules of the Administrator of the Workers' Compensation Court, at Appendix 22-48.

[2] See Rules of the Administrator of the Workers' Compensation Court, Rule 3 Section 2(L) and Section 12, at Appendix 28, 42.

Members of OESG contractually agree to pay all premiums due for workers' compensation insurance coverage and further agree to cooperate in any way with the association's periodic audits of the member's payroll records. *See contract at Appendix 13-21.* OESG as a self-insurance association, simply allows its members to pool their risk of workers' compensation liabilities as employers and, thereby, spread the risk of loss among a far larger group of businesses than an individual employer could do. Self-insurance associations also allow their members to avoid paying the profit built into large commercial insurance companies' premiums.

This case involves the failure of Petitioner, Colbert Nursing Home, Inc., to pay premiums due and owing to OESG for workers' compensation insurance coverage. This case also involves the exemption of self-insurance associations from the purview of federal securities regulations by the McCarran-Ferguson Act. While many states permit formation of self-insurance associations, only a few have enacted self-insurance association laws which are similar to that of the state of Oklahoma.

While the legal arguments presented in this matter are very similar, the facts of these two cases are completely different. Colbert Nursing Home signed an indemnity agreement with OESG to become a member of OESG and thereby obtain workers' compensation insurance coverage for its employees.[3] OESG provided insurance coverage to Colbert from August 25, 1994, through

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[3] See Indemnity Agreement and Power of Attorney, at Appendix 13-21.

March 1, 1996. Colbert's employees filed numerous claims and received substantial benefits as a result of OESG's coverage. Colbert failed to pay $58,060.00 worth of the insurance premiums to OESG. OESG sued Colbert Nursing Home to recover the unpaid workers' compensation insurance premiums.

Respondent, Self Insurers Management Association (hereinafter "SIMG") sued its members for a much different reason. SIMG was forced to sue its members for a 2.5 million-dollar assessment to help the association recoup its losses. The indemnity agreements provide for and allow associations to assess their members when the total amount of claims paid exceeds the premiums collected. *Unlike SIMG, OESG has never assessed its members.* However, when individual members of an association, like Colbert, fail to pay the premiums they owe, they hurt the association and the other members by lessening the association's ability to pay claims of the members' injured workers.

OESG disputes each and every allegation contained in Colbert's Joint Petition, at page five (5), numbered one (1) through four (4). OESG has throughout this litigation maintained that it did not offer and sell interests which by law could be construed as unregistered securities. As concerns allegation number one, OESG simply made membership in its association available through properly licensed independent insurance agents. Colbert sought out and applied for membership in the OESG association. OESG, like all self-insurance associations, is required by the Rule 3, Section 8, to file an annual report as a matter

of public record with the Oklahoma Workers' Compensation Court.[4] This annual report must contain a certified audit, performed by a certified public accountant, showing the financial condition of the association. OESG has always complied with this rule. Any interested person or member of the association may inspect this public record.[5] Examination of those audits would show any interested person that OESG has remained at all times on solid financial ground.

History of the Litigation

Colbert terminated its membership in OESG on March 1, 1996. After terminating its membership, Colbert requested OESG audit its account. The resulting audit revealed that Colbert owed OESG an additional premium of $72,469.00. Colbert refused to pay the premiums. OESG then applied Colbert's deposit of $14,409.00 to the unpaid balance.[6] On August 2, 1996, OESG sued Colbert to recover the remainder of the unpaid premiums, which total $58,060.00. Colbert filed its counterclaim on October 31, 1996, alleging that the contract for membership in OESG was an unregistered security in violation of the Oklahoma Securities Act and the Securities Act of 1933.

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[4] See Rules of the Administrator of the Workers' Compensation Court Rule 3, Section 8, at Appendix 34.

[5] See Rules of the Administrator of the Workers' Compensation Court Rule 3, Section 3(e); Rule 3, Section 4 and Section 8, at Appendix 29, 30, 34.

[6] Each member of the OESG association is required to pay a deposit of 25% of the first year's normal premium. See Rule 3, Section 11, at Appendix 41.

Colbert was granted summary judgment in the District Court on January 16, 1997. As noted in the Oklahoma Supreme Court's July 8, 1997, Opinion, the judgment entered by the trial court did not specify the grounds upon which Colbert was granted judgment. Pet. App. 18.

The Oklahoma Supreme Court reversed the trial court's grant of summary judgment to Colbert Nursing Home. The Oklahoma Supreme Court properly held that under the provisions of the McCarran-Ferguson Act, federal securities laws do not apply when a state's laws regulate and govern the conduct of an insurer. The Oklahoma Supreme Court did not *give* retroactive effect to Section 149.1.C. As the court stated in its ruling, it is clear from the wording of Section 149.1.C that the Oklahoma Legislature intended the statute to have retroactive effect. Pet. App. 7. More specifically, the Oklahoma Supreme Court determined the amendment embodied in Section 149.1.C was made to merely clarify what the Legislature perceived the law to have been since the passage of Section 149.1 in 1981. Pet. App. 8. Thus, contrary to the argument of the Petitioners, the Oklahoma Supreme Court simply applied Section 149.1.C as it found it.

REASONS FOR DENYING THE WRIT

The Court should not grant certiorari in this case for the following reasons:

1. The Oklahoma Supreme Court has not decided an important federal question in a way that conflicts with a decision of another state court of last resort, or of a United States court of appeals. The Joint Petitioners

do not even contend the ruling of the Oklahoma Supreme Court falls within the criterion of Rule 10(B) of the Rules of the Supreme Court of the United States.

2. The Oklahoma Supreme Court has not decided an important question of federal law that has not been, but should be, settled by this Court. Likewise, the Oklahoma Supreme Court has not decided an important federal question in a way that conflicts with relevant decisions of this Court. The Joint Petitioners have failed to show the Oklahoma Supreme Court decided a federal question in a way that conflicts with a relevant decision of this Court.

3. Petitioner Colbert failed to raise and properly preserve on appeal the issues it now asserts before this Court.

4. The Oklahoma Supreme Court has not denied the Petitioners protection of federal securities laws.

5. The Petitioners never argued before the trial court or the Oklahoma Supreme Court that retroactive application of Section 149.1.C would deprive them of their right to due process under the Fourteenth Amendment of the United States Constitution.

PROPOSITION I: PETITIONER COLBERT FAILED TO RAISE BEFORE THE TRIAL COURT AND PROPERLY PRESERVE ON APPEAL TO THE OKLAHOMA SUPREME COURT THE ISSUES IT NOW RAISES ON PETITION FOR WRIT OF CERTIORARI

The Rules of the Supreme Court of the United States, Rule 14(g)(i) require:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were first raised; the method or manner of raising them and the way in which they were passed on by those courts; . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Virtually all of the arguments presented in Colbert's Propositions I, IA, IB, and IC are raised for the first time in the Joint Petition for Writ of Certiorari. OESG maintained throughout the trial court proceedings that its insurance contract with Colbert was exempted from both the Oklahoma Securities Act and the Federal Securities Act of 1933. Colbert submitted three briefs to the trial court in support of its motion for summary judgment and in opposition to OESG's motion for summary judgment. Colbert's trial court briefs do not contain a glimmer of the legal arguments set forth in its Propositions I, IA, IB, and IC. Colbert never presented the trial court (and consequently the Oklahoma Supreme Court) with a rebuttal argument against the application of the McCarran-Ferguson Act to the facts of this case. *None* of the cases cited in Colbert's Joint Petition for a Writ of Certiorari, nor any of the legal arguments they support are found in the trial court record and the record on appeal. Therefore, the Oklahoma Supreme Court appropriately states, "Without citation of authority Colbert contends that Oklahoma Employers Safety Group violated federal securities laws." Pet. App. 20.

Petitioner Colbert's "Proposition II" argues its Fourteenth Amendment due process rights were violated. At no point in the trial court proceedings, or in the appellate court, did Colbert argue or allege that application of Oklahoma Statute Title 85, Section 149.1.C would work an impermissible deprivation of property rights upon Colbert in violation of the Federal Constitution. In fact, nowhere in Colbert's trial court briefs, or in the record on appeal is there even one citation to the due process clause of the Fourteenth Amendment to the United States Constitution.[7] Neither the trial court nor the Oklahoma Supreme Court passed decision on this question. Colbert now improperly raises the argument for the first time in its Petition for a Writ of Certiorari to this Court. Because Colbert's "due process" argument is not properly and timely raised, this Court is without jurisdiction to review the judgment in question on a writ of certiorari.

Because the Oklahoma Supreme Court did not consider or pass judgment on the federal questions now raised by Colbert before this Court, this Court is devoid of jurisdiction to review the Oklahoma Supreme Court's

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[7] On appeal from the trial court's ruling in favor of Colbert, OESG filed a motion with the Oklahoma Supreme Court requesting the appeal be retained for disposition by the Oklahoma Supreme Court, bypassing the Oklahoma Court of Appeals. OESG's motion was granted by court order on January 31, 1997. Pursuant to Oklahoma Supreme Court Rule 1.36(g), governing appeals of summary judgments, only the record from the trial court proceedings was considered on appeal by the Oklahoma Supreme Court. No additional briefs or legal arguments were submitted to the Oklahoma Supreme Court during the appellate process.

ruling on the questions presented. Colbert's Joint Petition for a Writ of Certiorari must be denied.

Because Joint Petitioners failed to timely raise and preserve these issues as required by United States Supreme Court Rule 14(g)(i), OESG objects to this Court's consideration of the Joint Petitioners' Petition on this ground alone, and requests this Court deny Joint Petitioners' Petition for Certiorari. Without waiving this objection, OESG submits the following Respondent's Brief.

PROPOSITION II: THE OKLAHOMA SUPREME COURT PROPERLY APPLIED THE McCARRAN-FERGUSON ACT

OESG has demonstrated that the federal questions the Joint Petitioners request this Court consider are not properly before the Court for review. However, assuming *arguendo* the Joint Petitioners did properly raise and preserve these arguments for review, OESG responds as follows.

The Petitioners essentially request this Court to ignore the clear provisions of the McCarran-Ferguson Act. Petitioners ask the Court to require Oklahoma self-insurance associations to comply with the Securities Act of 1933, despite the fact that Congress created the McCarran-Ferguson Act for the sole purpose of allowing the individual states to create and regulate entities such as self-insurance associations. In hopes of gaining the Court's attentions, the Joint Petitioners allege the Oklahoma Supreme Court has "re-written" the McCarran-

Ferguson Act. This is a gross and misleading accusation. The McCarran-Ferguson Act states, in pertinent part:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: . . .
>
> 15 U.S.C. §1012(b)

The Oklahoma Supreme Court noted the Oklahoma Legislature authorized the creation of self-insurance associations by enacting Oklahoma Statute title 85, §149.1. Pet. App. 20. Pursuant to Section 149.1, the Oklahoma Legislature provided that the Oklahoma Workers' Compensation Court would regulate such self-insurance associations. 85 O.S. §149.1; Pet. App. 20. Because the Oklahoma Legislature has enacted laws specifically to allow the creation and regulation of self-insurance associations, these state laws overseeing insurance associations cannot be invalidated, impaired or superseded by an act of the United States Congress, which does not specifically relate to the insurance business – i.e., the Securities Act of 1933. Pet. App. 20-21.

The Oklahoma Supreme Court's ruling is in direct compliance with Congress's mandate as embodied in the McCarran-Ferguson Act. The Supreme Court of Oklahoma cited *Federal Trade Com'n v. National Casualty Co.*, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958) as authority for its decision. Therein, the Court noted that each state in question had enacted legislation which prohibited unfair advertising by insurance companies. The states' legislation provided for the enforcement of those

laws through a scheme of administrative supervision. The Court found the provisions of Section 2(b) of the McCarran-Ferguson Act were satisfied by the creation of state regulatory laws governing the insurance business, thereby foreclosing federal regulation of the insurance business advertising practices in those states. *Federal Trade Com'n v. National Casualty Co.*, 357 U.S. at 564-565, 78 S.Ct. at 1262.

As stated in *Federal Trade Commission*, the states possess ample means to regulate the business of insurance within their boundaries. *Federal Trade Commission*, 357 U.S. at 564, 78 S.Ct. at 1262. The Oklahoma Supreme Court opinions recognize that Oklahoma has enacted legislation providing for the creation of self-insurance associations and their regulation by the Oklahoma Workers' Compensation Court. Under the clear mandate of the McCarran-Ferguson Act, no act of Congress, unless it specifically relates to the business of insurance, may invalidate, impair, or supersede any law enacted by a State, which regulates the business of insurance. Just as in *Federal Trade Commission*, the Oklahoma Supreme Court found the provisions of Section 2(b) of the McCarran-Ferguson Act were satisfied by state regulation and correctly determined the Securities Act of 1933 may not be applied to Oklahoma self-insurance associations.

The cases cited by Petitioners in their Propositions I, IA, IB, and IC are inapplicable and certainly not controlling authority on the specific facts and issues presented by this case.

Howlett by and through Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), does not apply to

the instant situation. The Oklahoma Supreme Court's opinion did not disagree with the content of, nor did it refuse to recognize a superior federal law. The Oklahoma Supreme Court's opinion recognizes the federal authority of the McCarran-Ferguson Act, follows its provisions and correctly holds that state laws regulating insurance companies cannot be invalidated, impaired or superceded by the Federal Securities Act of 1933.

The Oklahoma Supreme Court's opinion should not follow the principle contained in *Holloway v. Peat Marwick, Mitchell & Co.*, 879 F.2d 772 (10th Cir. 1989 Okl.), cert. granted and vacated, *Peat Marwick Main & Co. v. Holloway*, 494 U.S. 1014 on remand 900 F.2d 1485 (10th Cir. 1990), cert. denied, *KPMG Peat Marwick v. Holloway*, 498 U.S. 958. Despite the Joint Petitioners' arguments, the Oklahoma Supreme Court's opinion did not displace the applicability of federal securities laws. Rather, it followed the intent of Congress and applied the McCarran-Ferguson Act to forbid federal securities laws from impairing a state law created for the purpose of regulating the Oklahoma self-insurance associations.

Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed 2d 668 (1969), actually supports the Oklahoma Supreme Court's ruling in this matter. When insurance companies are engaged in the "business of insurance" the McCarran-Ferguson Act applies to preempt federal regulation which would invalidate state law regulating that business. The selling and advertising of insurance policies, the licensing of companies and their agents, the relationship between insurer and insured, the type of policy which can be issued, its reliability, interpretation and enforcement, are

all within the core of the "business of insurance" for the purposes of the McCarran-Ferguson Act. *SEC v. Nat'l Sec., Inc.*, 393 U.S. at 460, 89 S.Ct. at 568. Thus, state laws regulating the relationship between an insurance company and its policyholders, i.e., OESG and Colbert, are supreme and are not preempted by other federal legislation. That part of the *Securities and Exchange Commission* opinion cited by Colbert relating to Arizona's attempt to regulate the relationship between a stock holder and an insurance company, in which the stockholder owns stock, is inapplicable to the present case as OESG did not sell stock in its association.

Barnett Bank of Marion County, N.A., v. Nelson, 517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed. 2d 237 (1996), involves a federal statute *which specifically relates to the business of insurance* within the meaning of the exception of the McCarran-Ferguson Act. Therein, a federal statute specifically granted national banks in small towns the authority among other things, to sell insurance. The statute preempted a diametrical Florida law prohibiting national banks from selling insurance in such situations. There is no language in the Securities Act of 1933 which, as stated by the Court in *Barnett Bank of Marion County*, "using ordinary English, one would say . . . specifically relates to the *'business of insurance.'* " 517 U.S. at 39, 116 S.Ct. at 1111. The Court's opinion in *Barnett Bank of Marion County* in no way supports Colbert's case.

SUBPROPOSITION IIA: WHETHER THE PETITIONERS ARE ENGAGED IN THE BUSINESS OF INSURANCE IS IRRELEVANT.

As concerns Colbert's Subproposition IB, Colbert's Joint Petition is the first time it has ever argued that

Colbert was not "engaged in the insurance business" so as to prohibit application of the provisions of the McCarran-Ferguson Act. The Joint Petitioners in their Subproposition IB do not allege that the trial court or the Oklahoma Supreme Court considered this argument and improperly denied them relief. Notwithstanding this fact, it is irrelevant whether the Joint Petitioners are engaged in the insurance business.

Colbert has never argued that OESG does not qualify for the preemption clause of the McCarran-Ferguson Act by not falling within the definition of "engaging in the insurance business." At the trial court level, OESG demonstrated that it was engaged solely in the business of insurance. App. 9-12 and 51-53.

Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 102 S.Ct. 3002, L.Ed.2d 647 (1982) sets forth the criteria that courts must examine when determining whether an insurance company's activities fall within the core definition of the business of insurance for the purposes of exempting that activity from federal regulation under the McCarran-Ferguson Act. *Pireno* holds that if an insurance company's particular activity *falls outside* the business of insurance, that activity *may* be subject to federal regulation.

The Oklahoma Supreme Court ruled, in essence, that OESG falls squarely within the guidelines established by the Court in *Pireno*, by declaring:

> It is clear that Oklahoma Employers Safety Group's primary business was to provide workers' compensation insurance to its members, . . . "
>
> Pet. App. 21.

The Joint Petitioners' Subproposition IB is nothing more than a plea for a misguided interpretation and application of *Pireno* to this case. *Pireno* says nothing about the business practices of the insureds. It does not stand for the principle that the McCarran-Ferguson Act cannot be applied to this case to prevent the Joint Petitioners from receiving the protection of the federal securities laws.

SUBPROPOSITION IIB: THE EXEMPTION OF THE MCCARRAN-FERGUSON ACT WAS PROPERLY APPLIED

The opinion of the Oklahoma Supreme Court clearly shows that applying the Securities Act of 1933 to the facts of this case would invalidate, impair and supercede the provisions of 85 O.S. §149.1 et seq. of the Oklahoma Workers' Compensation Laws. Despite the fact that Colbert failed to raise any of the legal arguments contained in its Subproposition IC before the trial court and the Oklahoma Supreme Court, OESG briefly responds to Colbert's Subproposition IC.

The Oklahoma Supreme Court observed that the Oklahoma Legislature established a clear public policy that compensation to injured employees covered by the Oklahoma Workers' Compensation Act must be secured. Pet. App. 8. The Court found that the Oklahoma Legislature, in order to further this important public policy, established 85 O.S. §149.1 to allow for the creation of self-insurance associations and to provide for their regulation by the Oklahoma Workers' Compensation Court. Pet. App. 20.

Contrary to Joint Petitioners' assertion in their Subproposition IC, there is a logical explanation why the application of the federal securities laws will impair and impede Oklahoma's regulation of self-insurance associations. Oklahoma Statute title 85, §149.1 and the Oklahoma Workers' Compensation Court Rules governing self-insurance associations provide an extensive program for regulating self-insurance associations. Included within this regulatory system are criterion for the form and content of all contracts for membership in self-insurance associations, as well as a requirement that self-insurance associations disclose their financial status to the public. To require self-insurance associations to comply with both acts, (the Securities Act of 1933 and 85 O.S. §149.1) would be to simply ignore the clear mandate of the McCarran-Ferguson Act. Requiring self-insurance associations to comply with the Securities Act of 1933 would fly in the face of Congress's policy that the continued regulation by the several states of the business of insurance is in the public's best interest.[8]

As an aside, it should be noted that self-insurance association rules requiring they report their financial status to the public by filing certified audits with the Oklahoma Workers' Compensation Court, belies and eliminates Joint Petitioners' argument that they were deprived of protection or incapable of making an

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[8] 15 U.S.C.A. §1011 reads: Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

informed decision when joining a self-insurance association.

PROPOSITION III: THE OKLAHOMA LEGISLATURE DRAFTED SECTION 149.1.C TO BE RETROACTIVE AND THE OKLAHOMA SUPREME COURT'S APPLICATION OF SECTION 149.1.C DID NOT DIVEST PETITIONERS OF A VESTED RIGHT

As explained in Proposition I, Colbert never argued at the trial court level or on appeal that the due process clause of the Fourteenth Amendment should be applied to prevent them being divested of a "vested right." Thus, Colbert's "due process" argument is not properly before this Court and should be rejected for this reason alone.

Colbert also asks the Court to review the Oklahoma Supreme Court opinions upon the ground the opinions violated the provisions of the Oklahoma Constitution Article V, Section 52. At the trial court level, Colbert only half-heartedly argued that it possessed a "vested right" to its defense under the Oklahoma Constitution. However, Colbert fails to explain the meaning of a "vested right" as that term is used in relation to the Oklahoma Constitution.

Colbert also inaccurately argues that the Oklahoma Supreme Court retroactively applied Section 149.1.C to deprive them of their defense. The court applied Section 149.1.C in the manner which the Oklahoma Legislature intended it to be applied.

> "This amendment to §149.1 makes abundantly clear the Legislature's intention that the agreements of all members of all associations created under the terms of §149.1, including the

> Agreements at issue here, are not covered by the Oklahoma Securities Act."
>
> Pet. App. 7.

Even though the Oklahoma Legislature enacted Section 149.1.C to be applied retroactively, its application to this case did not deprive the Joint Petitioners of a "vested right" allegedly embodied in their securities law defense.

In fact, what Colbert contends is an "existing defense" to OESG's lawsuit, is actually nothing more than an untested legal theory. In order for an "existing defense" to take the form of a vested right, that defense must be supported by established common law or by statutory law in existence at the time the defense is first asserted. In order to have a vested right in a defense for the purposes of the Oklahoma Constitution, the defense must be established by either common law, statute, or by contract. *See Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, 464 P.2d 748, 755 (Okl. 1968); *Resolution Trust Corporation v. Wright*, 868 F.Supp. 301304 (W.D.Okl. 1993). Colbert fails to cite in its Joint Petition, and in fact, will find no Oklahoma statutory or common law supporting its "existing defense."

The Oklahoma Supreme Court's opinion correctly notes that without existing common law or statutory law supporting one's defense, one cannot be said to have a vested right in that defense. The Oklahoma Supreme Court's opinion is replete with statements concerning the failure of Colbert to put forth common law or statutory authority supporting its securities law defense.

> "[N]o express Oklahoma law made group self-insurance agreements subject to the Oklahoma

> Securities Act before the 1996 amendment to §149.1. In fact, it seems clear to us that the Legislature amended §149.1 to clarify what it perceived the law to have been since the passage of §149.1 in 1981."
>
> Pet. App. 7-8.
>
> "Defendants/Appellees do not suggest what it is that gave them a vested interest in the trial court's decision, and we see nothing that could have done so."
>
> Pet. App. 8.
>
> "Thus, there was no statutory or case law indication prior to the trial court's ruling to support Defendant/Appellees claim that Defendants/Appellees have a vested interest in having their Agreements deemed securities."
>
> Pet. App. 9.

These excerpts from the Oklahoma Supreme Court's opinions make it clear the court understood and considered the definition of a "vested right." The court's opinions point out that because Colbert fails to provide common law or statutory authority supporting its defense, the defense does not rise to the level of a vested right.

Colbert misleadingly argues it had a vested right in its defense under the provisions of the Oklahoma Securities Act. In truth, the Oklahoma Securities Act makes no mention of self-insurance association contracts, nor does it require such contracts be registered as securities.

Colbert never argued to the trial court that Article I, Section 10 (the "Contract Clause") of the United States

Constitution prevents the application of Section 149.1.C to this case. Colbert inappropriately raises this argument for the first time in its Joint Petition. Because this federal question argument was never presented to the Oklahoma Supreme Court, Colbert is barred from raising the "Contract Clause" as a defense at this time. Pursuant to United States Supreme Court Rule 14(g)(i), this Court is without jurisdiction to consider this argument. OESG hereby objects and defends against Colbert's "Contract Clause" proposition on this ground. Without waiving its objection, OESG would show the Court the "Contract Clause" is not a valid defense for Colbert.

As stated earlier, at the time OESG and Colbert contracted, no law was in force which made group self-insurance agreements subject to the Oklahoma and federal securities acts registration requirements. Again, it must be noted that Colbert cites no common law or statutory authority validating its claim that self-insurance association agreements are subject to the Oklahoma Securities Act registration requirements.

The enactment of Section 149.1.C certainly did not impair Colbert's contractual rights. Colbert admits it received workers' compensation insurance coverage for its employees. Colbert's employees workers compensation claims were paid by OESG. Colbert could not have relied upon the laws in existence at the time it contracted with OESG for support of its securities law defense because no such laws existed. In fact, as held by the Oklahoma Supreme Court, the law has always been that self-insurance association contracts are not subject to securities laws registration provisions. Pet. App. 7-8.

CONCLUSION

It is undisputed that Colbert received the benefit of its bargain with OESG. Colbert still refuses to pay its premiums. The entirety of this litigation, including Colbert's Joint Petition, is nothing more than an elaborate ruse concocted by Colbert to avoid fulfilling its contractual obligations to OESG. Colbert is hardly an "unsuspecting small business," but is a company that having received the benefits of its insurance coverage, simply does not want to bear the burden of paying fair premiums.

Colbert made absolutely none of the federal question arguments it presents in its Joint Petition to the Oklahoma courts and, thus, there are no federal questions properly presented to this Court by the Joint Petition. Colbert cannot claim to be ignorant of this fact. Colbert has improperly submitted a Petition for Writ of Certiorari to this Court knowing this Court to be without jurisdiction to consider the Petition. Colbert's Petition is a deliberate attempt to delay the administration of justice in this litigation.

The Oklahoma Supreme Court's decision is without flaw and correctly interprets and applies the law of Oklahoma, the McCarran-Ferguson Act, and the Securities Act of 1933, to hold that self-insurance association contracts are not subject to Oklahoma and federal securities laws registration requirements. The Oklahoma Supreme Court's application of a retroactive statute in this case did not violate Colbert's federal or state constitutional rights,

as their asserted defense, not being even vaguely supported at law, does not rise to the level of a "vested right."

Although the Oklahoma Supreme Court's decision is truly limited to application in the State of Oklahoma, if relied upon by other jurisdictions, the opinion will serve to further the McCarran-Ferguson Act's purpose of allowing the individual states the right to regulate the insurance business.

For the foregoing reasons, Oklahoma Employers Safety Group Self-Insurance Association respectfully requests that Colbert's Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A., Plaintiff,	)	Case No. CJ-96-5268
vs.	)	
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation, Defendant.	)	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Aug. 30, 1996)

COMES NOW the Plaintiff, Oklahoma Employers Safety Group, S.I.A. ("OESG") and moves this Court to enter summary judgment pursuant to Rule 13 of the Rules of the District Court for the reason that all matters on file in this action raise no substantial controversy as to any material fact.

STATEMENT OF MATERIAL FACTS

1. Colbert Nursing Home, Inc. ("Colbert"), contracted with OESG to receive workmen's compensation insurance coverage. SEE EXHIBIT "A," Application and Contract for Membership, attached hereto.

2. Colbert received such coverage from August 25, 1994, to March 1, 1996. SEE EXHIBIT "B" PARAGRAPH 2, Affidavit of Tom Mobley, attached hereto.

3. Colbert agreed to pay all premiums for its workers compensation insurance coverage. SEE EXHIBIT "A," page 3, paragraph 3.

4. On or about February, 1996, the Defendant wrote OESG to advise they were cancelling their workers compensation insurance coverage effective March 1, 1996. Defendant requested that OESG conduct its normal payroll audit "so that we [the Defendant] may reconcile *additional* or return premiums due from our expiring insurance with you." See EXHIBIT "B," paragraph 3.

5. Pursuant to Defendant's request, OESG did perform an audit of both fund years for which Defendant was provided workers compensation insurance. See EXHIBIT "B," paragraphs 5, 6 and 7.

6. The amount of premium owed by Defendant is determined by Defendant's total payroll for each period to determine Defendant's total payroll. The audits use the Defendant's books and records. When the audits were completed they were signed by an authorized representative of the Defendant who attested that the audit was true and correct. OESG relied on these representations. SEE EXHIBIT "B", paragraph 7.

7. The time periods for which Defendant owes Plaintiff are:

August 25, 1994 – April 1, 1995
April 1, 1995 – March 1, 1996

8. For the time period of August 25, 1994, to April 1, 1995, ("94/95") Colbert owes $54,568.00 for premiums; Colbert has made partial payment of $21,360.00. Colbert

owes OESG $33,208.00 for unpaid premiums. SEE EXHIBIT "B," paragraph 8.

9. For the time period of April 1, 1995, to March 1, 1996, ("95/96") Colbert owes $93,907.00 for premiums; Colbert has made partial payment of $54,646.00. Colbert owes OESG $39,261.00 for unpaid premiums. SEE EXHIBIT "B," paragraph 9.

10. OESG applied a $14,409.00 deposit made by the Defendant toward the debt, leaving a total amount owed of $58,060.00. SEE EXHIBIT "B," paragraph 11.

As to these facts, there is no substantial controversy and Plaintiff is entitled to judgment as a matter of law.

BRIEF AND ARGUMENT IN SUPPORT

Rule 13 of the Rules for the District Courts of Oklahoma, 12 O.S.A. Chp. 2, allows the trial court to render a summary judgment if it appears there is no material controversy as to the facts of the case. There are no facts in this case tending to show that there is a genuine issue for trial regarding the subject transaction. Therefore, summary judgment is proper. *See, Weeks vs. Wedgewood Village, Inc.*, 544 P2d 780 Okla. 1976, and *First National Bank and Trust vs. Kissee*, 859 P2d 502 Okla. 1993. In this case there is no dispute about the following:

1. Defendant signed an agreement asking for workers compensation insurance.
2. Defendant received workers compensation insurance for the periods in question.
3. Plaintiff made partial payments toward the premiums owed.

4. Pursuant to Defendant's request, audits were conducted using Defendant's books and records to determine the total premium owed.

5. The audits determine total payroll which is used to determine the total premium owed.

6. Defendant signed the audits agreeing that they were correct.

7. Based upon the audits, Defendant owes $58,060.00.

8. Pursuant to the contract sued on herein, specifically par. 3, The Defendant is obligated to pay all premiums within 30 days of the date the sum shall become due.

9. Defendant has not paid the total premium owed.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against the Defendant Colbert Nursing Home, Inc., d/b/a Southern Pointe Living Center in the amount of $58,060.00 plus pre-judgment interest, a reasonable attorney's fee and all costs of this action.

Respectfully submitted,

/s/ Mark J. Pardos
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Attorney for Plaintiff

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A., Plaintiff,	)	
vs.	)	Case No. CJ-96-5268
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation, Defendant and Third-Party Plaintiff,	)	
vs.	)	
DAVID DANK, Third-Party Defendant.	)	

OKLAHOMA EMPLOYERS SAFETY GROUP'S RESPONSE TO COLBERT NURSING HOME, INC.'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO COLBERT NURSING HOME, INC.'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF OKLAHOMA EMPLOYERS SAFETY GROUP

COMES NOW the Plaintiff, Oklahoma Employers Safety Group, S.I.A. ("OESG") for its Response to Defendant, Colbert Nursing Home, Inc.'s Motion For Summary Judgment and Reply to Colbert Nursing Home, Inc.'s Response In Opposition To Motion For Summary Judgment of OESG.

COLBERT HAS RAISED NO DISPUTE OF ANY MATERIAL FACTS

Colbert admits that it was a member of OESG. See Colbert's objection to OESG's Motion For Summary Judgment "OESG fact 1, pg 4 attached as Exhibit "A". Colbert admits that it received workmen's compensation insurance coverage. Exhibit "A" "OESG fact 2", pg. 5. Colbert admits that it agreed to pay all premiums relating to its membership in OESG. Exhibit "A" "OESG fact 3", pg. 5. Colbert admits that it requested an audit. Exhibit "A" "OESG fact 4", pg. 5. OESG's fact 5 states that an audit was performed using Colbert's payroll for the applicable period and that Colbert agreed with the correctness of the audit. Facts 6 through 10 states the amount charged, the amount received and the amount owed. Colbert raises no dispute as to any of these facts. *Instead Colbert says that it doesn't know if there are fact issues because these facts are subject to the discovery which has been served upon OESG by Colbert.* This is not true. Only four of Colbert's Interrogatories to OESG (numbers 1, 2, 7 and 10) addressed the correctness of the calculation of the premiums owed. All of these were fully responded to prior to Colbert filing its Motion To Compel. See Exhibit "B". In fact, Colbert's Motion To Compel does not address any of these Interrogatories. See Exhibit "C". In short, Colbert has not provided to this Court any admissible evidence which disputes the material facts stated by OESG. OESG has provided admissible evidence. Colbert has not specifically controverted this evidence with its own admissible evidence. Therefore, OESG's facts are deemed admitted. *Rule 13, Rules of The District Court.*

COLBERT SHOULD PAY FOR SERVICES PROVIDED

Colbert has raised one legal issue which attacks OESG's ability to collect the premiums owed *under the contract* between the parties. Colbert asserts that the contract is void or unenforceable because it violates the securities laws. In support of this argument Colbert asks this Court to take judicial notice of the case styled *Self-Insurers Managements Group v. 99A Training Center, Inc., Et Al,* Case No. CJ-89-9984 in the District Court of Oklahoma County ("Self-Insurers"), wherein this court found a contract for workers compensation insurance unenforceable due to violations of the state securities laws. Though the Plaintiff respectfully submits that each case must be determined on its own merit, rather than based upon the findings made in another case, the differences between this case and the Self-Insurers case illuminates the flaws in the defenses asserted by the Defendants. The Self-Insurers case involves an assessment. An assessment occurs when the association does not bring in enough money from all the members to pay all the members workers claims. The individual members are charged, usually in a pro-rata method, with the responsibility of making up the aggregate short coming. The only basis to hold a member responsible for assessment is the "joint and several" provision in the application for membership (contract) that they sign. Thus, no contract, no assessment. However, the case at bar involves only a premium owed and as such the Self-Insurers case is irrelevant. Because the existence of or validity of a contract between OESG and Colbert is irrelevant.

This case involves the collection of monies owed for a service provided. A valid contract is absolutely unnecessary in order for OESG to recover for the value of the service it provided to the Defendant, Colbert Nursing Home, Inc., OESG is entitled to recover the value of the services provided to Colbert even if the application for membership/contract is unenforceable.

> "When a person has performed services for another, even though it is under an invalid or unenforceable contract, he may recover for those services upon quantum meruit, on the basis of an implied promise to pay the reasonable value for the services. Thus, where one furnishes labor to another under a contract which. . . . is void and of no effect he may recover the value of his services on a quantum meruit as a benefit to the persons receiving them."

66 Am. Jur.2d §61. This concept is well entrenched in Oklahoma law regarding unenforceable written contracts. *Morris Plan Co. v. Campbell,* 67 P.2d 52 (Okla. 1937). *Macsas v. Fishencord,* 124 P.2d 388 (Okla. 1942). *Gutowsky v. Jones,* 178 F.2d 60 (10th Cir. 1949). *Bumcrots v. Alberti,* 132 F.2d 757 (10th Cir. 1943). *Hall v. Haer,* 16 P.2d 83 (Okla. 1932). Thus, OESG is entitled to recover for the insurance provided regardless of the determination of the validity of the contract.

OESG IS NOT SUBJECT TO THE PROVISIONS OF THE OKLAHOMA SECURITIES ACT

Colbert's proposition no. 1 states that the contract to provided workers compensation insurance between

OESG & Colbert gives rise to an interest in OESG that is a security under both the Oklahoma Security Act and the Federal Securities Act of 1933. However, whether the contract is a security or not is irrelevant because OESG is not subject to the Oklahoma securities laws or the Federal securities laws.[1]

Colbert cites and quotes the statute that dooms their argument concerning the Oklahoma Securities Act. Okla. Stat. tit. 85 (1991) §149.1 (c) states as follows:

> "A group self insurer created pursuant to this section *either prior to or after* the effective date of this act *shall not be subject* to the provisions of the Oklahoma Securities Act." (emphasis added).

This statute unequivocally excludes group self insurers, such as OESG, from the provisions of the Oklahoma Securities Act. This statute expressly states that it is to apply to group self insurers formed both *prior to* and after the effective date of the act. Therefore, Colbert's primary argument is overruled by the Oklahoma Legislature.

OESG IS NOT SUBJECT TO THE PROVISIONS OF THE FEDERAL SECURITIES

Colbert also alleges that OESG is a subject to the Federal Securities Act of 1933. Like the Oklahoma Act,

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[1] The definition of security does not include insurance. Okla. Stat. Ann. tit. 71 §2(T). A full discussion of the insurance exemption can be found *infra*, in connection with discussion of Federal securities laws. For Oklahoma case law see *Young v. Stephenson*, 82 Okl 239 (Okla. 1921).

this act has no applicability to OESG. OESG is in the business of providing insurance and is thus excluded from the Federal Securities Law by the McCarran-Ferguson Act. The McCarran-Ferguson Act states as follows:

> "No act of congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the *business of insurance* . . . " (emphasis added) 15 U.S.C. §1012(b).

Where the ultimate purpose of the agreement between the parties is to provide insurance the agreement between the parties constitutes "the business of insurance" within the meaning of the McCarran-Ferguson Act. *Am. Mut. Reinsurance v. Calvert Fire Insurance Co.*, 367 N.E.2d 104, 109 (Ill. Po. App. 1977). There is no dispute, nor can there be any dispute that the ultimate purpose of the agreement (attached as Exhibit "D") was to provide workers compensation insurance to Colbert.[2] Further, all OESG does is provided workers compensation insurance and OESG is in no business other than to provide workers compensation insurance for its members.

The underlying reasons for the exemption from Federal Securities Laws provided by the McCarran-Ferguson Act is that state legislation regulates the conduct in question.

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[2] In the fourth Whereas paragraph of Exhibit "D, pg. 3" it states that the member i.e. Colbert and OESG have elected to establish a group self insurance association pursuant to the provisions of the Oklahoma Workers Compensation Act.

> "The McCarran-Ferguson Act renders Federal Securities Laws inapplicable when state legislation generally proscribes, permits or otherwise regulates the conduct in question and authorizes enforcement through a scheme of administrative supervision."

Am. Mut. Reinsurance, Supra at 109; See also *F.T.C. v. National Casualty Co.*, 357 U.S. 560, 78 F.Ct. 1260 (1958).[3] Oklahoma has legislated the formation of self insurance associations and a scheme for regulating the same. *Rules of Workers Compensation Court Rule 3 & 1 & 2.* Attached hereto as Exhibit "E". Thus, using the Federal Securities Law to impair the operation of self insurance associations violates the McCarran-Ferguson Act.

Moreover, OESG is also exempt from the Federal Securities Act under 15 U.S.C. 11C(a)(8) which exempts any insurance policy issued by a company subject to the supervision of a state agency. The fundamental characteristic of a policy of insurance is spreading and underwriting of the risk; the risk to be insured against is shifted or distributed. *American Deposit Corp. v. Schacht*, 877 F.Supp. 1066 (N.D. Ill. 1995). Again, it is not disputed, nor can it be disputed, that the purpose of the agreement (Exhibit "D" between OESG and Colbert) is the spreading

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[3] The conduct in question complained of by Colbert revolves around failure to allegedly disclose certain information. However, as seen in Exhibit "E, pg 4" the Worker's Compensation Court requires extensive disclosure by self insurance associations, which include all the relevant disclosures required in the Federal Securities Act of 1933.

and underwriting of the risk regarding workers compensation insurance claims, etc. *The very nature of self-insurance associations is such that if Colbert or any other members claims greatly exceed its premiums, the excess would be absorbed by the association thus spreading the risk among the members.* Therefore, OESG is exempt from the Federal Securities Act by virtue of the insurance exemptions located at 15 U.S.C. 77C(A)(8).

* * *

CONCLUSION

Colbert admits that they received workmen's compensation insurance coverage and there is no dispute as the amount owed for the workmen's compensation insurance coverage. OESG is not subject to the Oklahoma or Federal Securities Act and did not breach the contract between the parties. And, even if Colbert was able to obtain a ruling from this Court of a void contract though its clearly inapplicable securities argument, OESG would still be entitled to recover the money owned by Colbert for the services provided by OESG to Colbert.

Respectfully submitted,

/s/ Kent J. Nicholson
EAGLETON & NICHOLSON, P.C.
Don R. Nicholson II, OBA #6673
Mark J. Pordos, OBA #11476
Kent A. Nicholson, OBA #16706
201 Robert S. Kerr, Ste. 310
Oklahoma City, Oklahoma 73102
(405) 236-0550
Attorney for Plaintiff

APPLICATION AND CONTR T FOR MEMBERSHIP
OKLAHOMA EMPLOYERS SAFETY GROUP 3087400
SELF INSURANCE ASSOCIATION

NCCI NO. 354028506
Requested Coverage Date 6-25-04

1. Colbert Nursing Home, Inc. dba Southern Pointe Living Center
NAME OF MEMBER AS IT APPEARS ON TAX RETURN (If d/b/a or additional names are used, attach separate sheet)

2. Mailing Address: P.O. Box 47 · Colbert, OK 74733

3. Telephone Number: 405-296-4500 4. Fax Number: 405-296-4502

5. Payroll Office Address: P.O. Box 939 - Antlers, OK ~~74733~~ 74523

6. Principal Location: 101 Sherrard - Colbert, OK 74733

7. How many locations within Oklahoma? 1 8. List all other locations on separate sheet and attach.

9. Completely describe business and operations. If needed, attach separate sheet.
Nursing Home

10. Years under current management/ownership: 6 11. Federal Employer I.D. No. 731-310456

12. Type of Business: ☐ Individual ☐ Partnership ☒ Corporation ☐ Other (Explain) 13. Years in Business: 6

14. Advise any name change, consolidation, merger or other ownership change during the last three years.
none

15. No. of Employees: 60 Do you lease employees *to* another business? ☐ Yes ☒ No Do you lease employees *from* another business? ☐ Yes ☒ No If yes, attach a completed supplemental application.

16. Names of officers, owners or partners and addresses: (If more space is needed, please list and attach.)

(Last)	(First)	(Middle)	Address	Social Security #	Title	Percentage of Ownership	Include for Coverage
Mitchell	Bob		Sq 14 Sec		Pres	22 1/2 %	X
Mitchell	Deloris		"			22 1/2 %	☐ Yes ☒ No
Green	Gilbert		"		V-Pres	22 1/2 %	X
Green	Philip		"		Sec - Treas.	22 1/2 %	☐ Yes ☒ No
Chappell	Kathy		Antlers			10	☐ Yes ☒ No

17. Has the corporate officers payroll been included in determining the estimated annual premium? ☐ Yes ☒ No
Payroll to be included must be part of the Rating Information Section.

18. If you engage owner/operators of truck rigs, do you intend to include them in coverage? ☐ Yes ☐ No ☒ N/A If yes, please list all owner/operators on a separate sheet and attach.

19. Has any workers' compensation insurance policy ever been canceled for any reason? ☒ Yes ☐ No If yes, explain on separate sheet and attach. Currently being canceled for loss ratio

20. Is the premium financed? ☐ Yes ☒ No If yes, attach signed copy of finance agreement with premium payment.

21. Do you have a safety program in operation? ☒ Yes ☐ No Please list details on separate sheet if applicable.

22. Do employees travel out of state? ☐ Yes ☒ No 23. Are pre-employment physicals required? ☒ Yes ☐ No

24. Do you provide health insurance for your employees? ☐ Yes ☒ No

25. Do you own and/or operate aircraft? ☐ Yes ☒ No

EXHIBIT "D"

App. 13

BEST AVAILABLE COPY

PRIOR EXPERIENCE

ATTACH A 3 . . . R LOSS RUN FROM PRIOR CARRIER(S) GIVING LOSS DETAILS AN. PAYMENTS

YEAR	INSURER	ANNUAL PREMIUM
93-94	Security Self Ins. Assoc.	~~$1,277~~
92-93	" " " "	93,918
91-92	" " " "	95,000

$92,328 per LW OK.

WARNING!

AS REQUIRED BY LAW, YOUR ARE HEREBY NOTIFIED THAT ANY PERSON WHO KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD, OR DECEIVE ANY INSURER, MAKES ANY CLAIM FOR THE PROCEEDS OF AN INSURANCE POLICY (I.E. AGREEMENT OF COVERAGE) CONTAINING ANY FALSE, INCOMPLETE OR MISLEADING INFORMATION *IS GUILTY OF A FELONY.*

CONTACT INFORMATION

PERSON TO CONTACT RE: SAFETY/LOSS CONTROL:	PERSON TO CONTACT RE: ACCOUNTING/PAYROLL RECORDS
Kathy Chappell 405-298-5151 Lori Hannah 405-216-4500	Kathy Chappell 405-298-5151

RATING INFORMATION

LOCATION	CLASS CODE	CATEGORIES, DUTIES AND CLASSIFICATIONS OF EMPLOYEES	NO. OF EMPLOYEES	EST. ANNUAL PAYROLL
	8810	Clerical	3	38,000
	8829	Nursing Home Employees	57	300,000

AMOUNT REQUESTED FOR INCREASED EMPLOYER'S LIABILITY: $ 500,000

OPTIONAL MEDICAL BENEFITS DEDUCTIBLE INFORMATION

Pursuant to Oklahoma Statute 85 §64, every agreement of coverage issued by the Oklahoma Employers Safety Group Self Insurance Association may include a deductible amount for medical benefits. Any deductible chosen will affect the premium paid by the member. In regard to these deductibles, the Association shall pay the entire cost of all medical deductibles and then require reimbursement from the member for the deductible amount. If the member does not reimburse the deductible amount directly to the Association within sixty (60) days of a written demand for payment, the member shall be liable for the full amount of any such claim for medical care and treatment. No portion of any deductible amount shall be charged or passed on to an injured worker. Please check below the deductible program(s) you wish to have quoted.

☐ NONE ☒ $500.00

A copy of the latest audited financial statement, the balance sheet from the latest Federal Tax Return or a balance sheet prepared on a GAAP basis which has been signed and dated by an owner, partner or officer must be submitted. COVERAGE CANNOT BE BOUND WITHOUT 25% PREMIUM DEPOSIT PAYMENT, A NOTARIZED NOTICE OF JOINT AND SEVERAL LIABILITY SIGNED BY AN OWNER, PARTNER OR OFFICER, FINANCIAL STATEMENT, LOSS HISTORY AND ALL OTHER REQUESTED INFORMATION.

INDEMNITY AGREEMENT AND POWER OF ATTORNEY
(PLEASE READ CAREFULLY)

This Application and Agreement are made by and between each and every member of the OKLAHOMA EMPLOYERS SAFETY GROUP SELF INSURANCE ASSOCIATION ("ASSOCIATION"), and by and with the ASSOCIATION itself, based upon the following understandings by the parties.

WHEREAS, the Members have organized and formed an ASSOCIATION which shall be known as the OKLAHOMA EMPLOYERS SAFETY GROUP SELF INSURANCE ASSOCIATION, and;

WHEREAS, the ASSOCIATION, on behalf of its Members, will submit to the Oklahoma Workers' Compensation Court, ("Court"), an application to permit the Members to enter into an agreement to pool their respective liabilities under the Oklahoma Workers' Compensation Act, referred to as ("ACT"), and;

WHEREAS, the Rules of the Court require that each and every Member of the Group self insurance association shall execute an Indemnity Agreement and Power of Attorney, and;

WHEREAS, each Member of the ASSOCIATION has elected to become a party to this Agreement, to comply with conditions set forth herein and to establish a group self insurance association pursuant to the provisions of the ACT and the Rules of the Court, and to execute such instruments and take such action as may be required to form and continue such ASSOCIATION.

NOW, THEREFORE, and in consideration of the mutual covenants, promises and obligations contained in this Agreement, which are given by the ASSOCIATION and by each and every Member to each other Member and are so accepted by each and every Member and the ASSOCIATION, the parties hereto covenant and agree as follows:

1. ASSOCIATION, through its MEMBER SUPERVISORY BOARD, ("BOARD"), shall collect all premiums and assessments owed by Member when same is due, or the ASSOCIATION shall promptly terminate the membership of any delinquent Member as provided by Court Rules and shall take all reasonable and necessary actions to collect such delinquent accounts from any terminated Member. The Member will neither ask for or receive credit from the BOARD for payment of premium

2. ASSOCIATION shall acquire excess insurance in amounts required by the Court for the protection of its Members against catastrophic loss.

3. Member *JOINTLY AND SEVERALLY* argues to assume, pay, and discharge any liability under the ACT of any and all Members of the ASSOCIATION, and Member agrees to pay any premiums and assessments as may be required by the BOARD for liabilities and obligations that may incur under the ACT during the term of the Member's participation in the ASSOCIATION. The member is obligated to pay all premiums and lawful assessments within thirty (30) days of the date the same shall become due.

4. Member agrees to cooperate in any way with the Association in regard to periodic audits and inspections to be performed by the Association during the term of this Agreement.

5. In the event any premium or lawful assessment is not paid and collection process becomes required by the Association, the member agrees to pay the cost of collection thereof including a reasonable attorney fee of the amount sought to be recovered plus ten percent (10%) interest on all unpaid amounts. In the event litigation becomes necessary in regard to collection or any other dispute that may arise as a result of this Agreement, the parties stipulate that Oklahoma County, Oklahoma will be the proper venue for the legal action. The parties further stipulate that if supplemental proceedings are required subsequent to judgment, the president and secretary of a corporate member or all partners of a partnership member or the individual in the event of an individual member shall submit to the supplemental proceedings in Oklahoma County, Oklahoma.

6. Member agrees to notify the ASSOCIATION immediately upon entering into any leasing contract for its employees. The ASSOCIATION shall *not* be liable for any sums that the Member must pay as a result of a claim for wrongful discharge that may be brought against said Member pursuant to Sections 5, 6 and 7 of the ACT and the ASSOCIATION shall not investigate said claims nor provide any defense to said Member for same.

7. Member is to report to the Association immediately any changes in the business structure of the member or addresses thereof or additional locations obtained.

8. Member is obligated to promptly report all workers' compensation claims arising during the term of his/her membership to the Association on the prescribed forms.

9. Member shall establish safety guidelines for his/her firm in order to give his/her employees the maximum in safe and sanitary working conditions.

10. Association will defend, in the name and on behalf of the member, any suits or other proceedings which may at any time be instituted against the member on account of injuries or death within the purview of the Oklahoma Workers' Compensation Law. Liability of the self-insurance association to the employees of any employer is specifically limited to such obligations as are imposed by the Oklahoma Workers' Compensation Law.

11. Member grants David M. Dank, as administrator, the power of attorney to act for and to bind the members in all transactions relating to or arising out of the operations of the Oklahoma Employers Safety Group Self Insurance Association, including but not limited to authorizing the administrator to accept service of process for the Association and to file with and make requests for information from the National Council on Compensation Insurance. The administrator shall determine all sums due the fund from the members, pay all approved items of expense as directed by the Board and give the Board an annual accounting of all monies so

handled. The Administrator shall carry out the lawful policy established by the Board for the successful operation of the self insurance association in accordance with the provisions of the Administrator's Contract. The Board retains the right of substitution of the Administrator and the right of revocation of the power of attorney granted to the administrator in accordance with the provisions of the Administrator's Contract filed with the Court.

12. Regardless of whether the Member terminates its membership in the ASSOCIATION voluntarily, or whether such membership is terminated by the ASSOCIATION or the Court, this Agreement, the *JOINT AND SEVERAL OBLIGATION* and the power of attorney shall continue in force and effect and shall remain completely unabated concerning any and all liabilities and obligations that the ASSOCIATION or its Members may incur under the ACT or by actions of the Board during the term of the Member's participation in the ASSOCIATION.

13. Member intends this Agreement as a mutual covenant of assumption and not as a partnership, but if any court of competent jurisdiction shall construe it to be a partnership, then it is the intent of the parties that such partnership be limited in scope to the uses for which this Agreement is executed and for no other.

14. Member *JOINTLY AND SEVERALLY* covenants and agrees that there shall be no disbursements out of funds of the ASSOCIATION by the way of dividends or distribution of claim reserves until provision has been made for all obligations of the ASSOCIATION under the ACT and, except at the discretion of the

BOARD, upon application and approval by the Court.

15. Member may terminate its membership in this ASSOCIATION by giving ten (10) days written notice by certified mail, return receipt requested to the ASSOCIATION and to the Court. Termination of a Member's membership by the ASSOCIATION or by withdrawal of approval by the Court shall be upon ten (10) days written notice by certified mail, return receipt requested to the Member and the Court.

16. Member consents to allow ASSOCIATION to obtain a consumer report from a consumer reporting agency.

SIGNATURE OF MEMBER/APPLICANT

Kathy Chappell	Owner	8-23-94
Official/Representative of Member (Print Name)	Title	Date

/s/ Kathy Chappell
Signature

CONTINUING GUARANTY

The undersigned JOINTLY AND SEVERALLY, PERSONALLY AND UNCONDITIONALLY GUARANTEE payment of any amounts not paid when due by the insured under the foregoing Membership Agreement. The liability of the undersigned shall not be affected by the discharge or release of the indebtedness, liability or obligation of the insured. In the event any amount is not paid under this Guarantee, the undersigned agree to pay all costs of collection, including a reasonable attorney fee

and ten (10) percent interest on the unpaid balance. Further, the undersigned agree that Oklahoma County, Oklahoma will be the proper venue for any such legal action and agree to submit to proceedings supplemental to judgment in Oklahoma County, Oklahoma.

Guarantor, Personally — Date

Guarantor, Personally — Date

Witness — Date

PRODUCER INFORMATION

LARRY JONES — Producer

PROPERTY INSURORS — Agency

3817 NW EXPRESSWAY, STE 1030, OKC OK 73112 — Address

942-7117 — Telephone

949-1149 — Fax

Received and Accepted by the MEMBER SUPERVISORY BOARD and the FUND ADMINISTRATOR of the OKLAHOMA EMPLOYERS SAFETY GROUP SELF INSURANCE ASSOCIATION.

Chairman — Date

Illegible — Fund Administrator

9/23/94 — Date

EXHIBIT "E"

RULES OF THE ADMINISTRATOR OF THE WORKERS' COMPENSATION COURT

RULE 1.

DETERMINATION OF MEDICAL COSTS

A good faith effort shall be made by the self-insured employer or insurance carrier to pay all charges, or the portion of all charges which are in compliance with the Schedule of Medical Fees. All medical charges which are in compliance with the Schedule of Medical Fees should be paid within thirty (30) days after such charges are submitted to the self-insured employer or insurance carrier. If such good faith payment is not made within sixty (60) days of the charges being submitted, and the issue of compensability of the injury, necessity of treatment, or other issues requiring a judicial determination are not raised before a Judge of the Workers' Compensation Court, the Schedule of Medical Fees will become applicable only if ordered by a Judge of the Workers' Compensation Court.

Charges disputed due to conflicting interpretation of the Schedule of Medical Fees may be submitted to the Administrator by the medical provider to determine the proper amount due in accordance with the Schedule of Medical Fees.

A request for Administrative Review of disputed medical charges may be made by filing a Form 18, REQUEST FOR ADMINISTRATIVE REVIEW OF DISPUTED MEDICAL

CHARGES. A copy of the Form 18 and all supplemental materials shall be sent by the medical provider to the self-insured employer or the insurance carrier. A copy of the actual medical bill in dispute must include dates of service, procedure codes, charges for services rendered and any payment received, and an explanation of unusual services or circumstances.

When a Form 18 is received by the Administrator and it is determined that the Workers' Compensation Court lacks jurisdiction in the matter, a Submission Form shall be forwarded to the self-insured employer or insurance carrier to be signed and returned by their authorized legal representative before the Form 18 will be reviewed.

When the Form 18 is received by the Administrator and it is determined that the Workers' Compensation Court has jurisdiction over the cause of action, all parties will be notified by mail. All parties shall have thirty (30) days from the date of notification to submit further evidence, documentation, or clarifications to the Administrator. After thirty (30) days, a decision will be determined by the Administrator and an order will be issued. Prior to this determination, the Administrator may request all parties to attend a hearing on the matter.

Any party feeling aggrieved by the order of the Administrator shall have ten (10) days to appeal the ruling to a Judge of the Workers' Compensation Court. A decision must be entered by the Administrator before any appeal may be brought.

Adopted effective April 30, 1989

RULE 2.

OWN RISK EMPLOYERS

Any employer subject to the Workers' Compensation Act, who has not otherwise secured compensation insurance for its employees, shall file with the Insurance Department of the Court, a completed Form 1-B, Employer's Application for Permission to Carry Its Own Risk Without Insurance. This application shall be submitted to the Court at least sixty (60) days prior to the desired effective date, or renewal date for existing permits. The application shall include complete answers to all questions contained therein and shall include satisfactory proof as to the employer's ability to pay an award made by the Court. All attachments listed on the Form 1-B must be submitted with the application.

With the exception of governmental entities, an employer desiring to self-insure must meet all the following qualifications and guidelines:

(1) Have been continuously engaged in business for a period of not less than five (5) years;

(2) Have had an average minimum payroll of not less than one million dollars ($1,000,000.00) in each of the preceding three (3) years;

(3) Have a shareholders' equity of not less than five hundred thousand dollars ($500,000.00); and

(4) Employ not less than one hundred (100) employees.

Applications must attach a financial statement (preferably audited), including a balance sheet and income statement. If the company's current fiscal year-end financial report is not available at the time of application, it should be submitted to the Court promptly. The application must also include a current proof of reinsurance (binder or certificate).

Any subdivision or subsidiary of any employer must provide a written guarantee from its parent company which states the parent company will be fully responsible for any liabilities that its subdivision or subsidiary may incur under the Workers' Compensation Act.

A self-insured company may be required to post a surety bond, letter of credit or initiate a reserve self-funding program. If posting a surety bond or letter of credit, the amount required will be determined by the Court Administrator. If the self-insured company self-funds their reserves, the following guidelines will apply:

(1) An initial fund amount, determined by the Court Administrator, will be deposited into a separate Workers' Compensation Claims Fund. This base amount will remain constant;

(2) The self-insured company will deposit, into this account, the amount of each claim reserved;

(3) Claims will be paid from this account. Once the claim is closed, excess money reserved may be returned to the self-insured company;

(4) All interest earned from this account may be retained by the company; and

(5) The Court reserves the right to order a third party Administrator to oversee this reserve fund.

An employer must obtain a policy of re-insurance from an approved or licensed carrier. Specific excess insurance is required by the Court. Aggregate excess coverage may be required. The reinsurance agreement shall contain a minimum of thirty (30) days written notice to the Court of cancellation. An insurance certificate or binder must accompany the application. A copy of the policy should be submitted to the Court promptly.

Any employer may be exempt by the Court from any of the above qualifications upon showing that the employer is otherwise financially able to pay any award made by this Court and the employer is in compliance with the statutes and Court Rules at the time the application is made.

Claims should be handled by a Court approved claims servicing company or by a Court approved benefits administrator within the self-insured company. If the self-insured employer employs a benefit Administrator for claims handling, the experience and qualifications of this person must be submitted at the time of the application. Court approval of the Self-Insurance Permit will also allow the benefits Administrator to service daims. An audit of the reserves may be required by the Court at any time.

A self-insured employer may not collect a premium from an employee for workers' compensation.

A governmental entity may make application to carry its own risk without insurance provided it furnishes the

Court with reasonably detailed information relative to its financial status, including a definite statement of the amount it has specifically appropriated for workers' compensation claims. Proof of reinsurance or other information regarding the governmental entity's ability to fund its obligation under the Workers' Compensation Act may be required.

Failure to comply with any provision of the Workers' Compensation Act or any of these rules shall be grounds for revocation of the own-risk permit.

The Court Administrator may, at anytime, call a Show Cause Hearing for any self-insured employer. The Court shall give ten (10) days prior notice of such hearing.

Any motion to revoke a Self-Insurance Permit shall be filed with the Court Administrator. The Administrator shall conduct an investigation and if necessary, a hearing on the revocation of said permit. Any order revoking a Self-Insurance Permit may be appealed to a three judge panel of the Workers' Compensation Court.

Adopted effective September 1, 1989.

RULE 3.

GROUP SELF-INSURANCE ASSOCIATIONS

This rule relates to a regulatory function of the Workers' Compensation Court and not to a judicial function. Approval by the Supreme Court of the State of Oklahoma would be inappropriate (See "Order of the Supreme Court", September 28, 1981).

Section 1: Authority

This regulation is promulgated and adopted pursuant to and in accordance with the provisions of 85 O.S. Section 1.2(E) and 85 O.S. Section 149.1.

Section 2: Purpose

The purpose of this regulation is to set forth rules, forms and procedural requirements which the Court deems necessary to carry out the provisions of 85 O.S. Section 149.1.

Section 3: Definitions

(a) "Court" means the Workers' Compensation Court of the State of Oklahoma.

(b) "Group Self-Insurance Association" or "Association" means an association organized by two or more employers having a common interest which have entered into agreements to pool their liabilities under the Oklahoma Workers' Compensation Act.

(c) "Employer" shall have the definition provided by 85 O.S. Section 3(3).

(d) "Common Interest" means employers engaged in the same or similar types of business or who otherwise have a recognizable common purpose for associating. If an application of an association is approved by the Court, different businesses which are owned or controlled by a member of the association are also eligible for membership in such association. For purpose of this regulation control shall be a "majority interest" as defined by the

Experience Rating Plan approved by the State Board for Property and Casualty Rates.

(e) "Certified Audit" means an audit upon which the auditor expresses his professional opinion as to whether or not the accompanying statements fairly present the financial position of the group self-insurance association and whether or not such statements are in conformity with generally accepted accounting principles consistently applied, including tests of the accounting records and other such auditing procedures that are considered necessary in the circumstances.

(f) "Gross Premium" means the annual premium for each employer developed by using rates and classifications approved by the State Board for Property and Casualty Rates.

(g) "Standard Premium" means the gross premium adjusted by experience modification factors developed in accordance with an Experience Rating Plan approved by the State Board for Property and Casualty Rates.

(h) "Normal Premium" means the standard premium less any allowable discount pursuant to Section 11 hereof.

(i) "Member" means an employer party to an indemnity agreement for membership in a group self-insurance association.

(j) "Act" means the Oklahoma Workers Compensation Act as provided by Title 85 of the Oklahoma Statutes.

(k) "Administrator" means the individual, partnership, or corporation designated and authorize as the representative of the members in the pooling of their liabilities under the Act and matters incidental thereto.

(l) "Indemnity Agreement and Power of Attorney" means the written agreement executed by each member of the association through which each member:

i. agrees to assume and discharge, jointly and severally, and liability under the Act of any and all members party to such agreement; and,

ii. grant the administrator power of attorney to act for and to bind the members in all transactions relating to or arising out of the operations of the association.

(m) "Member Supervisory Board", or "Board", means the representative body selected by the members which is to be responsible:

i. for holding and managing the assets;

ii. for directing the affairs of the association; and,

iii. for assuring that the association, through its members, is financially sound and able to meet its obligations under the Act.

Section 4: Application for Approval as a Group Self-Insurance Association: Requirements, Approval, and Review

Two or more employers having a common interest, as defined in Section 3, may be approved by the Court as a group self-insurance association for the purpose of entering into agreements to pool their liabilities under the Act. Such application shall be made in a form acceptable to the Court and shall be verified by the oath of at least two members of the members' advisory board of the association or the administrator.

If after review of the association's application, as well as the additional information as required by Section 5 hereof, the Court may approve the association's application if it has satisfactory proof of:

(a) the solvency of each member of the association;

(b) the financial ability of each employer to meet its obligations as a member; and,

(c) the ability of the association to pay or cause to be paid the compensation in the amount and manner and when due as provided for in the Act.

Any application so approved shall be subject to all conditions and requirements set forth in these rules and regulations. In order to determine continued compliance with the law and these regulations, such application shall be reviewed on an annual basis or whenever deemed necessary by the Court Administrator.

Section 5: Application for Approval as Group Self-Insurance Association: Additional Requirements.

The group self-insurance association's application should be submitted thirty (30) days prior to the effective date and shall be accompanied by all of the following:

(a) A copy of the members' indemnity agreement and power of attorney, as required by Section 12 hereof binding the association and each member thereof, jointly and severally, to comply with the provisions of the Act and copies of any other governing instruments of the proposed group self-insurance association;

(b) An executed copy of the application of each employer for membership in the association on the approved association's application effective date;

(c) A pro forma financial statement of the association, in accordance with the financial reporting requirements in Section 8 of this regulation. Such financial statements, or other verified information, shall indicate that the membership of the proposed association has a combined net worth of at least two million dollars ($2,000,000.00);

(d) A composite listing of the estimated annual gross premium to be developed by each member of the association individually. The aggregate shall contain a start-up premium of two hundred fifty thousand dollars ($250,000.00), and not be less than five hundred thousand dollars ($500,000.00) by the end of the first fiscal year, provided any group self-insurance association not formed in conjunction with an established employer trade association operating in the state of Oklahoma for not less than five (5) years must demonstrate a star-up [sic] funding of at least four hundred thousand dollars ($400,000.00), with an annual premium of at least one million dollars ($1,000,000.00);

(e) An insurance binder or certificate of excess insurance issued by an authorized insurer in an amount acceptable to the Court and that complies with the requirements as in Section 9 hereof;

(f) A designation of the initial members' supervisory board and of the administrator of the association, including properly executed biographical affidavits for each. Affidavits are to be submitted in a form acceptable to the Court;

(g) Information which shall satisfy the Court that the association either within its own organization, or by contract with an approved servicing organization, has ample facilities and competent personnel to service its program with respect to underwriting matters, claims adjusting, and industrial safety engineering;

(h) A confirmation of the fidelity bond in a form amount agreeable to the Court;

(i) A copy of the indemnity agreement and power of attorney as required by Section 12 that binds the association and each member thereof, jointly and severally, to comply with the provisions of the Act; and

(j) A projection of administrative expenses in an amount, for the first year of operation, and as a percentage, of the annual standard premium collected, in a form acceptable to the Court.

Section 6: Approval of New Members of the Association

A new membership may not become effective without Court approval. All applications for membership, in a form satisfactory to the Court, shall be filed with the Court. The application shall include evidence of the execution of the indemnity agreement and power of attorney as required by Section 12 hereof, with approval of the applicant by the association, and shall be accompanied by current financial statements satisfying the conditions as described in Section 8 hereof. Upon renewal of the application by any association, a complete list of active members shall be provided, including actual premiums paid

during the past year and projected annualized premiums for the application year.

Section 7: Investment and Reserve Requirements

The members' supervisory board of an association may, in its discretion, invest its funds in either of the following investments:

(a) Savings accounts or certificates of deposit in a FDIC or FSLIC insured institution; or,

(b) Direct obligations of the United States Treasury, either as notes, bonds, or bills that are backed by the full faith and credit of the United States Government.

An association shall maintain unearned premium and loss and claim reserves computed in [sic] manner acceptable to the Court.

Section 8: Filing of Reports

On or before the one hundred twentieth (120) day after the end of its fiscal year, every association shall file with the Court an annual report. Such report shall be submitted in a form acceptable to the Court and shall be verified under oath either by the administrator of the association of by other principal officers or members of the supervisor board.

The annual report shall reflect the association financial condition. The reporting of financial condition required shall consist of a certified audit report prepared by either an Oklahoma independent certified public accountant or

by Big Eight accounting firm. Audits must include complete breakdown of all monies collected by the group, including the amount discounted and complete breakdown of expenses. The audit should footnote and analyze completely all paid claims and claims reserved but not reported. A footnote must also be included to indicate if payments to contracted parties are in accordance with current contracts.

An interim financial statement shall be filed sixty (60) days following the mid-year fiscal anniversary of the association. This statement need not be audited, but should reflect pertinent data regarding income, including the standard premium discounts, interest earned, and expense constant fees, as well as a breakdown of the association expenses.

In addition to financial reports, every association approved by the Court shall file annually a reporting of its members' experience as a group self insurer in a form acceptable to the Court.

The association may be required to submit to the Court an independent audit of the reserves prepared by an acceptable firm or by the association's excess insurance carrier. The Court may order an audit of the reserves at any time.

Section 9: Contracts for Excess Insurance

Specific and aggregate excess insurance or reinsurance may be required as a condition for licensing a group self-insurance association and shall be subject to the following rules and conditions;

(a) A contract or policy of excess liability insurance shall not be recognized by the Court in considering the ability of an applicant to fulfill its financial obligations under this act unless such contract or policy:

1) Is issued by either an insurance company duly licensed by the State Insurance Commission or is otherwise authorized to write such coverage in the State of Oklahoma.

2) Is not cancelable or terminable for any reason except upon thirty (30) days written notice by registered or certified mail to:

i. the other party to the policy, and

ii. the Court.

3) Is automatically renewable at the expiration of the policy period except upon a thirty (30) days written notice by the party not renewing the policy, either by registered or certified mail to:

i. the other party to the policy, and

ii. the Court.

(b) Copies of the complete contract or policies of excess liability insurance, complete with all endorsements thereto, shall be filed with the Court.

(c) The aggregate coverage attachment point should not exceed one hundred percent (100%) of the standard premium, unless specifically authorized by the Court.

(d) Under certain conditions, an irrevocable Letter of Credit may be presented in lieu of aggregate excess insurance. The form and amount of said Letter of Credit must

be approved by the Administrator of the Workers' Compensation Court.

Section 10: Responsibilities of Members' Supervisory Board

The members' supervisory board shall be responsible for holding and managing the assets and directing the affairs of an association and shall be elected in the manner prescribed by the association's governing instruments. All board members must be members of the association. A board member shall not be either an owner, officer, or employee of any entity under contract with the association.

The board shall supervise the finances of the association and the association's operations to such extent as may be necessary to assure conformity with these rules and regulations, the members indemnity agreement and power of attorney, and the association's governing instruments. The members' supervisory board shall take all necessary precautions to safeguard the assets of the association, including (but not limited to) the following:

(a) Monitoring the financial condition of each member of the association, and doing all other acts to the extent necessary to assure that each member continues to be able to fulfill the obligations of membership, promptly reporting to the Court any grounds for believing that either a change in any member's financial condition, withdrawal of a member, or any other circumstances might affect the association's ability to meet its obligations.

(b) Designating an administrator to administer the financial affairs of the association, who shall furnish a fidelity bond with the association as obligee, in an amount sufficient to protect the association against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Court and evidence of such shall be filed with the Court, bond being one of the conditions required for approving the association.

(c) Retaining control of all monies either collected or disbursed by and for the association. All loss funds of any type shall remain in the custody of the board or the authorized administration; however, provided that a revolving fund for payment of compensation benefits due, and other related expenses, loss funds may be established for the use of any authorized service organization and shall furnish a fidelity bond covering its employees, with association as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Should the bond required of the administrator also cover the monies in the revolving fund, separate bond shall not be required of the servicing organization with respect to such revolving fund.

(d) Having the accounts and records of the association audited annually or at any time the Court deems necessary. The Court may prescribe a uniform accounting system to be used by self-insurance associations and/or servicing organizations, and the type of audits to be made in order that it may determine the solvency of the association.

Copies of the audit shall be filed with the Court within one hundred twenty (120) days after the close of the fiscal year. An association's fiscal year may not be changed without prior Court approval.

(e) Active efforts to collect delinquent accounts resulting from any unpaid premiums by members. Any member of an association who fails to pay the required premiums after due notice shall be ineligible for the self-insurance privilege until such past due account, including cost of collection, has been paid.

(f) The members' supervisory board shall hire legal counsel when deemed necessary to represent the membership in workers' compensation litigation. Board members will be responsible for monitoring fees paid to legal counsel.

(g) Neither the members' supervisory board nor the administrator shall utilize any of the monies collected as premiums for anything unrelated to the purposes of the group self-insurance association, to workers' compensation, or to securing the members' liability under the Act. Furthermore, they shall be prohibited from borrowing any monies from the association without advising the Court of the nature and purpose of the loan and obtaining the Court's approval. The board may, at its discretion, invest its funds in accordance with Section 7 hereof.

(h) The members' supervisory board shall assure that the administrator of the association and all records necessary to verify the accuracy and completeness of reports submitted to the Court, are maintained at a central location within the State of Oklahoma.

(i) The members' supervisory board shall assure that payroll audits of all members of the association are conducted in accordance with rules, classifications, and rates approved by the State Board for Property and Casualty Rates, as directed by the National Council for Compensation Insurance (N.C.C.I.)

(j) The association's supervisory board and the Court Administrator should be notified in writing of all disputes regarding proper rate classification codes. The Court may appoint a certified safety professional to review the scope manual to determine the applicable classification code. The expense of the professional service will be applied for by the association.

(k) The members' supervisory board shall notify the Court prior to all board meetings. Copies of the minutes of all board meetings shall be submitted to the Court in a timely manner.

(l) The Court must be notified within ten (10) days of any change in the association's board. Any new board member must submit to the Court a properly executed biographical affidavit.

(m) The board may designate a marketing firm or individuals to market the association's program. The marketer(s) of an association's program(s) must be either licensed agents in the State of Oklahoma, or approved by the Administrator of the Workers' Compensation Court. Marketing firms and all agents must be approved by the Court to market a self-insurance program.

All marketing material must be submitted to the Court prior to being utilized by an association. Each sales interview must include a clear presentation of a proposed members joint and several liability.

Section 11: Premium Deposit, Advance Premium Payments, and Distributions of Surplus Funds

The members' supervisory board of a group self-insurance association shall not allow any advance premium discount to any member in excess of that allowed by the excess insurance underwriter.

On the association's effective date, the premium deposit of at least twenty-five percent (25%) of the first year's normal premium payable by each member of the association, shall have been paid into a designated depository, which shall certify receipt of same to the Court. The balance of the first year's premium shall be paid, either in quarterly or monthly installments at the discretion of the board, no later than the end of the ninth month of that insurance year.

Any surplus monies i.e. those in excess of the amount necessary to fulfill all obligations under the Act, may be declared refundable by the board, and the amount of such declaration shall be a fixed liability of the association at the time of the declaration. The date of payment shall be as declared by the board, and notice thereof shall be given to the Court with such supporting information as the Court may require. Payment of surplus monies shall not be made until approved by the Court.

In the event of a deficit, such deficit shall be made up immediately either by assessment of the membership or by such alternate method as the Court may approve or direct.

Section 12: Indemnity Agreement

Every member of a group self-insurance association shall execute an indemnity agreement and power of attorney which shall set forth the rights, privileges and obligations of the member and the association and the powers and duties of the administrator. Such indemnity agreement and power of attorneys shall be subject to the approval of the Court and shall contain in substance the following provisions:

(a) An agreement, on a form approved by the Court, under which each member agrees to assume and discharge, jointly and severally, liability under the Act of any and all employers party to such agreement.

(b) Provisions requiring that the members' supervisory board designate and appoint an administrator empowered to accept service of process on behalf of the association and authorized to act for and bind the association and members in all transactions either relating to or arising out of the operation of the association.

(c) Provisions for the right of substitution of the administrator and revocation of the power of attorney and right hereunder.

(d) Provisions that clearly state all of the coverages of the policy.

One copy of the indemnity agreement and power of attorney shall remain in the members' possession at the time the application for membership is made. One copy must be filed with the Court.

Section 13: Administration and Servicing of Association

Any individual, partnership, or corporation desiring to engage in the business of servicing an approved workers' compensation group self-insurance association shall make application to the Court prior to entering into a contract with the association, and shall satisfy the Court that it has or will have, at the time it commences operation, adequate facilities and competent personnel to service a group self-insurance program with respect to underwriting matters, claim adjusting, and industrial safety engineering in such a manner as to fulfill the employer's obligation under the Act and the Rules and Regulation of the Court.

The application to the Court for approval to act as a servicing organization, for an association, may take the form of a letter explaining in detail the services that the company will be providing and describing its physical facilities and competency of its personnel to perform such services.

A servicing organization shall maintain a resident agent in the state of Oklahoma and that agent shall be authorized to act for the servicing organization on any and all matters covered by the Act and the Rules and Regulations of the Court.

A servicing organization shall file with the Court copies of all contracts entered into with the association as they relate to the services to be performed. Said contracts shall include those services necessary to fulfill the employer's obligations under the Act and the Rules and Regulations of the Court. In addition, any service contract must state that the servicing organization agrees to handle all claims incurred during the contract period to their conclusion, unless approval to transfer said claims is obtained from the Court prior to such transfer.

Any change in the servicing contract must be filed with the Court ten (10) days prior to the effective date.

Upon compliance with the above provisions of the satisfaction of the Court, a certificate of approval as a recognized and authorized servicing organization will be issued to the applicant.

Each individual, partnership, or corporation approved to act as a servicing organization for an association shall file an annual statement of financial condition with the Court within four (4) months after the close of its fiscal year, such statement having been prepared by an independent certified public accountant in a form acceptable to the Court.

Section 14: Termination of Members of Association

A member of an association may not be terminated unless at least ten (10) days written notice has been given to the member and the Court.

The association shall remain liable for all claims applicable to the period during which an employer was a member of an association, including the ten (10) days period required for termination of membership.

Section 15: Revocation of Approval of Self-Insurance Application

Failure to comply with either any of the foregoing rules or order of the Court within the time prescribed shall be considered good cause for revocation of the approval of an association's application. Noncompliance with any of the provisions of the Act shall likewise be deemed such cause. The Court shall give ten (10) days notice prior to such revocation to the association. Such notice shall be served either personally or by certified or registered mail, upon all interested parties setting forth the grounds therefore and affording the association an opportunity to introduce evidence and be heard. After a hearing, if the approval of the association's application is revoked, the revocation shall become effective thirty (30) days after issuance of the Court's order.

Section 16: Examination of Association

Whenever the Court deems it expedient for the protection of the interests of the people of the state of Oklahoma, it may make or direct to be made an examination into the affairs either of any association, member, marketing firm, or servicing organization approved in the state of Oklahoma.

Section 17: Penalties

Penalty for failure to comply with this regulation shall be as provided in Section 15 hereof.

Section 18: General Operating Guidelines of Association

A. The assets of a self-insurance association and control thereof are property of the self-insurance association members under the direction of its supervisory board members.

B. Any change in the by-laws and/or contracts with the association must be filed promptly with the Court.

C. Any false or misleading solicitation of membership in the group self-insurance association may be cause for cancellation of approval of the servicing organization, marketers, and the group self-insurance association as a whole.

D. Maximum operating expenses of the association should not exceed thirty-three percent (33%) of the standard premium. These expenses include the following:

1) Administrator's fee

2) Claims service fee

3) Marketing fees, billing and collection fees and sales commissions

4) General operations expenses, including audits

5) Cost of excess insurance

6) Any other fees previously approved by the Court.

E. The members discount must be approved by the Court at the time of application and/or renewal. It may not be changed without Court approval.

F. Any recalculation, of premium due to experience modification, cannot be retroactive more than one hundred eighty (180) days.

G. A cancellation short rate penalty fee may not be charged if the member has been a member of the association at least twelve (12) months prior to cancellation.

H. An association soliciting large numbers of another group's membership or utilizing marketing materials not approved by the Court Administrator are grounds for immediate revocation of the approval of the servicing organization, marketers, and the group self-insurance association as a whole.

I. Any trade membership dues must be collected separate from the self-insurance group association. Services provided by the trade association must be fully explained to members joining the trade association.

J. A separate safety program may not be sold to a member by the marketer of the association. A marketer may sell only the association's program to a member or prospective member.

K. At least ninety percent (90%) of all expense constant fees collected shall be deposited directly into the association's general revenues. No portion of these fees may be

paid to any group or individual contracted with the association in an amount greater than that of the normal sales commission allowed.

L. All billing and receiving will be supervised and reviewed by the claims servicing company and the administrator of the association. All monies must be deposited promptly in the self-insurance association's designated Oklahoma depository account.

M. Wrongfully changing employee classification codes or rates are grounds for immediate revocation of the approval of the servicing organization, marketers, and the group self-insurance association as a whole.

N. The association shall annually file all applicable information with the N.C.C.I. for the calculation member modifiers.

O. The Court may, at any time, have a Show Cause Hearing for any group self-insurance association. The Court shall give ten (10) days notice prior to such hearing.

Section 19: Severability

If any provisions of this regulation, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or application of this regulation which can be given effect without the invalid provision or application, and to that end the provisions of the regulation are severable.

Adopted effective January 1, 1990.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,

Plaintiff,

vs.

COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,

Defendant and Third-Party Plaintiff,

vs.

DAVID DANK,

Third-Party Defendant.

OKLAHOMA EMPLOYERS SAFETY GROUPS SUPPLEMENTAL RESPONSE TO COLBERT NURSING HOME, INC.'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO COLBERT NURSING HOME, INC.'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF OKLAHOMA EMPLOYERS SAFETY GROUP

(Filed Jan. 7, 1997)

COMES NOW the Plaintiff, Oklahoma Employers Safety Group, S.I.A. ("OESG") and for its Supplement to Briefs submitted for this Court's review and shows the Court as follows.

OESG did dispute the statements listed by Colbert as undisputed facts. The majority of the undisputed "facts" are questions of law addressed thoroughly in Plaintiff's

Briefs. Moreover, Colbert's allegations of mismanagement, fraud, etc. on the part of OESG completely lacking in any evidencing support.

While OESG has been determined to stay focused on the legal issues involved in this case and not participate in the unnecessary rock throwing which Colbert continues to initiate Plaintiff will quickly respond to these slanderous allegations.

David Dank has done a superb job as Administrator of OESG as a self insurance association. OESG, to this authors knowledge is the only self insurance association that has never required an assessment against its members. It is financially stable and has been operated in accordance with its constitution and By Laws from its inception to date. Every dollar which has been provided to David Dank for his impeccable services to OESG has been fully disclosed within the financial statements submitted to the Workmens' Compensation Court each year since he has been the Administrator. OESG has done more work to improve the safety of the workplace, thus reducing the amount of injuries to employees than any other self insurance association; OESG's focus is on reducing injuries to workers, thus reducing the cost of workmens compensation insurance to its members. David Dank is a respected member of this community and has done a superb job of running this self insurance association. David Dank is guilty of no wrong doing and any allegations to the contrary are ludicrous.

OESG IS NOT SUBJECT TO THE OKLAHOMA OR FEDERAL SECURITIES LAWS

It can hardly be disputed that most any insurance contract fits the definition of a security under both the Federal and Oklahoma Securities Act. Thus, the exemption of insurance contracts in the Federal Act and the exclusion of insurance contracts within the Oklahoma Act. OESG has demonstrated that its Application for Membership ("Contract") is an insurance contract both within the meaning of a federal insurance exemption and the Oklahoma insurance exclusion. In order to determine whether a contract is a contract for insurance or something else the question to be asked is does the agreement spread or distribute risks. *American Deposit Corp v. Schncht*, 887 F.Supp. 1066 (N.Dist. Ill, 1995). The definitions used under Oklahoma law in order to determine whether a contract is that of a contract for insurance or otherwise is virtually the same. Insurance is defined as "a contract whereby one undertakes to indemnify another or to pay a specified amount upon a determinable contingency". Okla. Stat. Ann. tit. 36 §102. "An insurer includes every person engaged in the business of making contracts of insurance or indemnity". Okla. Stat. Ann. tit. 36 §102. The definition of insurance is the same under Oklahoma common law. Insurance is a contract for consideration to pay a sum of money upon happening of a particular occurrence, event or contingency. *Young v. Stevenson*, 38 Okla. 242 (Okla. 1921). The very nature of OESG and other self insurance associations is such that if Colbert or any other members claims greatly exceed its premiums, the excess would absorbed by the association, thus

spreading the risk among the members. Thus the association indemnifies Colbert for the risk associated with workers injuries. The particular event of contingency which is being indemnified is the chance that Colbert's workers will be injured.

Colbert's Response is completely lacking authority. Colbert states that the contract at issue in this case is not insurance because it is not "straight insurance", yet Colbert provides no authority for the assertion that the Oklahoma exclusion or the federal exemption only applies to "straight insurance". Moreover, no authority is provided to inform this Court as to the meaning of "straight insurance". As this Court is aware, insurance comes in all different shapes and sizes. It is a unique facet of intrastate and interstate commerce and thus it has been left to the States to regulate this unique activity of the business of insurance. Colbert's only distinction between OESG's Application for Membership as to other insurance contracts is that Colbert had voting rights. Again, Colbert provides no authority that the existence of voting rights for members of OESG would some how take them out of the definition of insurance provided by the Court's interpreting both the Oklahoma and Federal Act. OESG has provided this Court with the authority regarding the definition of insurance and voting rights are *not* a factor.

OESG demonstrated in its Brief that the Federal Securities Laws cannot apply to OESG by virtue of the McCarran-Ferguson Act. Colbert Does not dispute that Okla. Stat. tit. 85 §149.1 and Rule 3 of the Workers' Compensation Court are state legislation regulating the business of insurance. OESG clearly demonstrated that the application of the Federal Securities Laws to OESG would impair

or impede Oklahoma legislation and regulation of self insurance associations. Thus the Federal Securities Laws cannot be applied to OESG by virtue of the McCarran-Ferguson Act. Colbert does nothing to dispute this fact.

THE AMENDMENT OF OKLA. STAT. TIT. 85 §149.1 IS APPLICABLE TO THIS ACTION

Colbert States that the application of the Amendment to Okla. Stat. Tit. 85 §149.1 will destroy an existing defense to this action. As demonstrated above the Oklahoma Securities Laws are not a defense to this action. The Amendment has not taken anything away from Colbert. OESG is not now or has it ever been subject to the Oklahoma Securities Act. The Amendment did nothing but to reiterate what has always been the law – that insurance is not subject to the Securities Act. Therefore, Colbert's citation to the Oklahoma Constitution, Article 5 Section 54 is inapplicable. No defense has been taken away.

CONCLUSION

This case involves a superious [sic] defense and counterclaim on behalf of Colbert Nursing Home, Inc., It is an attempt by Colbert to make slanderous unsupported allegations in order to avoid the payment of a debt owed. OESG has demonstrated that it is not subject to the Oklahoma Securities Act and is not subject to the Federal Securities Act. OESG has fully demonstrated that the bill and the amount owed is correct. Colbert does nothing to dispute the amount of the bill or what is owed. Colbert is

merely trying to avoid payment of a legal obligation by obfuscation.

Respectfully submitted,

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Supreme Court, U.S.
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No. 97-1977

In The

Supreme Court of the United States

October Term, 1997

THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATION, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, INC., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, INC., JOHN VANCE MOTORS, INC., and TROY WESTNIDGE, INC.,

Petitioners,

v.

SELF INSURERS' MANAGEMENT GROUP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENT SELF INSURERS' MANAGEMENT GROUP'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners are 14 of several hundred members of Self Insurer's Management Group (SIMG). SIMG was formed as a group self-insurance association. The reason for its formation bottoms on the Workers' Compensation Act of Oklahoma. It requires that every Oklahoma employer maintain workers' compensation coverage for its employees unless coming within a specific statutory exception, all per authority of Title 85 O.S. §11. An employer may provide workers' compensation coverage in one of three ways: (1) by purchasing a workers' compensation policy from an insurance company; (2) by self insuring and individually assuming liability for claims filed by its own employees; or (3) by self insuring and pooling liabilities with other self insurers through a group self insurance association per authority of Title 85 O.S. §61. Petitioners elected to join the several hundred other members and proceeded under option "(3)", supra. Petitioners joined the association, accepted its benefits but did not pay their insurance premiums.[1] Therefore, the association (SIMG) brought suit against those members (Petitioners herein) for failing to pay. The trial court ruled on Petitioners' Summary Judgment motion that the Agreement was unenforceable because the contracts were " . . . unregistered securities and therefore cannot be enforced . . . ". See said Final Journal Entry at Petitioners' Brief, App. 27. An appeal to the Oklahoma Supreme

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[1] See App. 1 which is the standard SIMG Agreement with its members. Paragraph 1 states in part "[t]he Association . . . shall collect all premiums and assessments owed by each and every member . . . "

Court resulted in a reversal. Petitioners seek this Writ because of the adverse Oklahoma Supreme Court Decision. See said Decision at Petitioners Brief, App. 1.

PERCEIVED MISSTATEMENTS OF FACTS AND LAW

As required by Rules of the Supreme Court, Rule 15, SIMG perceives Petitioners have made misstatements in their Joint Petition. Their first reason for granting the Writ as stated on page 7 of their Brief is:

> The Oklahoma Supreme Court has denied the Petitioners protection of federal securities laws on the *sole basis* that the McCarran-Ferguson Act "preempts" and displaces the provision of federal securities laws regarding the issuance of ownership interests in an insurance company/association. [Emphasis added.]

This is an erroneous statement characterizing the Oklahoma decision. The Oklahoma Supreme Court ruled against Petitioners on more than *one* basis. After its discussion of federal security laws not applying because of the McCarran-Ferguson Act, the Court's decision (Petitioners' Brief, App. 21) clearly states:

> *There is another and equally important reason* why state law must prevail here. In this appeal, Colbert and Oklahoma Employers Safety Group's other members are *not primarily investors.* Instead, they are employers with statutory responsibility to secure payment of workers' compensation benefits to their injured employees. To the extent, if any, that group members could be said to be investors, their rights as investors must be held to be secondary

> to their responsibilities as employers. When it passed §149.1.C the Legislature established a policy that such employers have no rights under state securities law. The legislation called for a comprehensive scheme of regulation, which has been implemented by the Workers' Compensation Court. Under these circumstances the McCarran-Ferguson Act mandates that federal securities laws do not apply. [Emphasis added.]

Simply stated, Petitioners are employers buying business insurance – not purchasers of securities.

REASONS FOR DENYING THE WRIT

1.a. AN AGREEMENT TO POOL WORKERS' COMPENSATION LIABILITIES THROUGH A SELF-INSURANCE ASSOCIATION IS NOT A SECURITY WITHIN SECURITIES ACT OF 1933 (Title 15 U.S.C. §77(A), et seq.).

To prevail, Petitioners must prove the Securities Act of 1933 regulates the subject insurance contracts of SIMG. Their Joint Petition is conspicuously absent of addressing the federal exception granted to insurance. That exception is found in Title 15 U.S.C. §77c(a)(8) which states the Securities Act of 1933 shall not apply to:

> Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like function, of any State or Territory of the United States of the District of Columbia.

Even without this specific exemption, it was the intention of the 1933 Act to exclude insurance policies because the legislative committee report issued at the time of passing the act stated that:

> "[T]he insurance policy *and like contracts* are not regarded in the commercial world as securities offered to the public for investment purposes. The entire tenor of the [1933] [A]ct would lead, even without [the 3(a)(8)] exemption, to the exclusion of insurance policies from the provisions of the Act, but the specific exemption is included to make misinterpretation impossible." H.R. Rep. No. 85, 73d Cong., 1st Sess., (1933) 15. [Emphasis added.]

Therefore, the 1933 Act itself defeats the Joint Petition.

1.b. THE MCCARRAN-FERGUSON ACT IS NOT VOIDED BY THE SUPREMACY CLAUSE.

The McCarran-Ferguson Act, 15 U.S.C. §1012[2], remains consistent with the theme of the 15 U.S.C.

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[2] McCarran-Ferguson Act, 15 U.S.C. §1012

(a) **State regulation.** The *business of insurance*, and every person engaged therein, shall be subject to the laws of the several States which related to the regulation or taxation of such business. [Emphasis added.]

(b) **Federal regulation.** No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the *business of insurance* or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [15 USCS §§1 et seq.], and

§77c(a)(8) insurance exception of the Securities Act of 1933. Its brief content of two subsections compels state regulation and prohibits federal regulation. The single reported decision dealing with workers' compensation insurance and its treatment by the McCarran-Ferguson Act is *Re Workers' Compensation Ins. Antitrust Litigation*, 867 F.2d 1552 (8th Cir. 1989, Minn.). The court enforced the McCarran-Ferguson Act and exempted the insurers from the federal regulation of the Sherman Act. In that case, the employers were again attempting to avoid paying lawful premium rates. The Court stated at page 1556 that "[w]e are satisfied that the district court was correct in finding that the alleged private rate setting by the defendant companies fell within the McCarran-Ferguson Act 2(a) provision relating to the business of insurance".

Petitioners attempt to avoid the "business of insurance" terminology by citing: 1) *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982); 2) *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987); 3) *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993); 4) *Securities and Exchange Commission v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996); 5) *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979); and 6) *Federal Trade Commission v. Dixie Finance Company, Inc.*, 695 F.2d 926

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the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 USCS §§41 et seq.], shall be applicable to the *business of insurance* to the extent that such business is not regulated by State law. [Emphasis added.]

(5th Cir. 1983), cert. denied, 461 U.S. 928, 103 S.Ct. 2088, 77 L.Ed.2d 299 (1983).

None apply here for the following reasons:

Union Labor case, supra: The issue is whether an insurance company's use of a Peer Review Committee as an aid to determine if claims are covered by its policies is exempt from anti-trust law under McCarran-Ferguson Act. This Court stated at page 132 that the use of a Peer Review Committee " . . . is a matter of indifference to the policy holder, whose only concern is *whether* his claim is paid, not *why* it is paid". The Court distinguished activities which exempt the "business of insurance" from the "business of insurance companies" at page 132. In the instant case, the contract of insurance is the controversy, see App. 1, not the method of how SIMG determines to pay claims. [Emphasis supplied.]

Pilot Life case, supra: This case deals with whether the general law of bad faith in Mississippi is sufficient to constitute state regulation, such state regulation being necessary to permit the McCarran-Ferguson Act to apply. The court stated at Page 50 " . . . that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry". There is no question or issue in the instant case that Oklahoma law (85 O.S. (1991) §149.1 and *Rule 3*) supplies regulation of SIMG and like insurance companies. Therefore the *Pilot Life* case has no application here.

Hartford Fire case, supra: This case ruled consistent with SIMG's position in the instant case. The Court in *Hartford* ruled that a domestic insurance carrier did not

lose its immunity from federal regulation by acting in concert with a foreign insurer that may not be regulated by state law. Petitioners' reliance on this case appears to be misplaced.

Securities and Exchange case, supra: This District of Columbia Circuit Court of Appeals case held that a viatical settlement is an investment contract and not an insurance contract.[3] The purchaser of the viatical settlement is not the insured. The Petitioners in the instant case *are* the insured, therefore giving rise to the "business of insurance" requirement of the McCarran-Ferguson Act. Purchasing an interest is an already existing life policy on a dying person is not the "business of insurance", but rather the "business of investing". Therefore no exemption from federal regulation exists.

Group Life case, supra: This case dealt with pharmacies selling drugs to insurer's policy holders at a small price in return for the insurer agreeing to reimburse the pharmacies for certain costs. The court held at page 212 that "[t]he significance of underwriting or spreading of risk as an indispensable characteristic of insurance was recognized by this court in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 3 L.Ed.2d 640, 79 S.Ct. 618 (1959)". In other words, the activity leading to federal regulation was not providing insurance, but arranging the purchase

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[3] A viatical settlement is an investment contract when an investor buys an interest in an existing life insurance policy of a terminally ill person – typically an AIDS victim at a large discount. When the insured dies, the investor gets the insurance benefit. *Securities and Exchange,* supra, 87 F.3d 536 at 537.

of prescriptions. As the court stated at page 216, "[t]he Pharmacy Agreements are not between insurer and insured. They are separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services *other than insurance*. [Emphasis added.] This case is certainly distinguishable from the instant case because SIMG's Agreement, App. 1, is for providing insurance, not some other commodity such as drugs.

F.T.C. case, supra: Here, the F.T.C. was investigating finance companies and automobile dealerships – not insurance companies. The investigation centered around whether those type businesses were requiring credit life insurance to be purchased as a precondition to the extension of credit. The court at page 930 allowed federal regulation because:

> Were the Commission attempting to investigate the *sale* of these policies, clearly the state statutes, such as Louisiana's R.S. 22:1212, would govern and the McCarran Act exemption would apply. But the Commission is not investigating any misrepresentations made in connection with the terms of any policy to be issued; rather, it is concerned with the extension of credit. While the offering of such policies in such a setting may facilitate the sale of insurance policies, that alone does not elevate the activity to the "business of insurance." *Perry v. Fidelity Union Life Insurance Co.*, 606 F.2d 468 (5th Cir. 1979). [Emphasis supplied.]

The nature of finance companies and automobile agencies cannot pass the test of being the "business of

insurance" as can SIMG which has as its sole objective to furnish workers' compensation insurance.

None of the aforementioned cases relied upon by Petitioners can circumvent the McCarran-Ferguson Act applying to SIMG. SIMG is a state regulated insurance association organized for the sole purpose of furnishing workers' compensation insurance to employers.

Subproposition I(C) of Petitioners Joint Petition, page 13, cites *U.S. Department of Treasury v. Fabe*, 508 U.S. 491 at 501, 113 S.Ct. 2202 at 2208, 124 L.Ed.2d 449 (1993). The purpose of citing this case seems to be to assert that the McCarran-Ferguson Act does not apply to SIMG. The reasoning used by Petitioners is unclear to Respondent. The *U.S. Department of Treasury* court reasoning, however, seems very clear. This case involves facts of liquidating an insolvent insurance company. Federal Department of Treasury was a creditor as well as a state court appointed liquidator. The liquidator invoked the McCarran-Ferguson Act to preclude federal priority of claims and allow use of state priority of claims. Again, the court honored the McCarran-Ferguson Act by upholding the state law when it stated that:

> We hold that the Ohio priority statute, to the extent that it regulates policyholders, is a law enacted for the purpose of regulating the business of insurance. To the extent that it is designed to further the interests of other creditors, however, it is not a law enacted for the purpose of regulating the business of insurance. *U.S. Department of Treasury*, Id. at 454.

In other words, the McCarran-Ferguson Act exemption applies to matters directly related to the business of

insurance, but not to incidental matters such as interests of non-policyholder creditors.

The Oklahoma Supreme Court decision challenged by Petitioners in the instant case is consistent with the holding in the *U.S. Department of Treasury* case. SIMG's collection of its premiums from policyholder Petitioners is clearly related to the "business of insurance".

THE OKLAHOMA LEGISLATIVE AMENDMENT IN 1996 DOES NOT AFFECT VALIDITY OF THE SUBJECT CONTRACT

Petitioners' Proposition II assumes the subject Agreement of insurance, App. 1, is a security. Based on that assumption only, the Agreement would be subject to the Oklahoma securities laws when the Agreement was executed. Therefore, the Agreement would necessarily be invalid because of being an unregistered security. That assumption of being a security is false for the reasons stated in this Brief's Proposition 1(a) and 1(b), supra.

Petitioners' misplaced reliance on the aforementioned false assumption leads them to a discussion of retroactive application of Title 85 O.S. 1996 §149.1.C. The original statute, Title 85 O.S. 1991 §149.1[4] is identical to

[4] 149.1. Rules for certain employers to pool liabilities.

A. The Workers' Compensation Court shall adopt rules permitting two or more employers not otherwise subject to the provisions of Section 2b of this title to pool together liabilities under this act for the purpose of qualifying as a group self-

the amended version except for the addition of subsection "C". The original version is silent as to whether the insurance policy is to be considered a security. Because of the clear status of the insurance contract being an insurance contract, there should be no question that the Oklahoma Securities Act[5] does not apply. Title 71 O.S. §2(t) defines "Security" as:

> (t) "Security" *does not* include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period. [Emphasis added.]

It is widely recognized that insurance contracts are not subject to securities laws. Even if it was assumed *arguendo*, that the Agreement constitutes a security, it is

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insurer and each such employer shall be classified as a self-insurer.

B. The Court shall approve the distribution of all undistributed policyholders' surplus of a Workers' Compensation Self-Insurance Program if the Program complies with the following criteria:

1. Has been in business for at least five (5) years;

2. Has its financial statements audited by a public accounting firm which audits at least one corporate client which has assets in excess of One Billion Dollars ($1,000,000,000.00) and on which the accounting firm has issued an unqualified opinion as to the fair presentation of the financial position of the Program showing adequate solvency and reserves; and

3. Is in compliance with the provisions of this title and all other regulations as required by the Court.

[5] Oklahoma Securities Act (Title 71, Oklahoma Statutes §1 et seq.)

exempt from registration under the Oklahoma Securities Act. Further, Title 71 O.S. §401(a)(5) exempts from "[a]ny security issued by any cooperative, nonprofit, membership corporation or association organized in compliance with the laws of this state." SIMG was a risk-sharing arrangement organized in compliance with the Workers' Compensation Act regulated thereunder and regulations further deemed it not for profit, but for the benefit of its members.

Because the Agreement is not a security and not affected by security laws, the Oklahoma legislature amending §149.1 should not raise the issue of retroactivity. To add words reiterating that group self insurers are not subject to regulation is at most clarification. As stated by the Oklahoma Supreme Court in its decision giving rise to this Petition For Writ:

> ¶13 Defendants/Appellees also contend that they have a vested right in the trial court's determination that the Agreements were void as being contrary to the Oklahoma Securities law, so that §149.1.C should not be applied retroactively, despite its clear language. We disagree. Defendants/Appellees rely on *Texas County Water Irr. and Water Resources Ass'n v. Oklahoma Water Resources Bd.*, 803 P.2d 1119 (Okla. 1990). That case, does not support Defendants/Appellees position. *There we held that where a prior enactment is ambiguous there is a presumption that subsequent legislation amending the act "was designed to clarify its text."* This is the situation before us here. Defendants/Appellees do not

> suggest what it is that gave them a vested interest in the trial court's decision, and we see nothing that could have done so. [Emphasis added.] See said decision at Petitioners' Brief, App. 8.

Furthermore, the Oklahoma Supreme Court found that "Defendant/Appellees *do not suggest* what it is that gave them a vested interest in the trial court's decision, and we see nothing that could have done so", supra. [Emphasis added.] See said decision at Petitioners' Brief, App. 8. This highlights the Petitioners' failure to raise at trial court and properly preserve on appeal the issue of "vested interest". This failure to raise the issue precludes jurisdiction by the U.S. Supreme Court under its Rule 14(g)(i).

CONCLUSION

Workers in Oklahoma should be entitled to have insurance covering job related injury. Employers should be entitled to choose to self insure and pool their liabilities with other self insurers through a group self insurance association regulated by the Workers Compensation Act.

Petitioners have made that choice. They also, however, made the further unfortunate choice of not paying their insurance premiums.

They attempt to nullify the McCarran-Ferguson Act by urging that a clearly defined insurance agreement is something else, by urging to disallow a state's right to permit establishment of self-insurance associations, and further disallow injured workers to be insured by

employer self insurance groups, all which fall short of the requirements necessary to grant a Writ of Certiorari.

The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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Attorney of Record and Attorney for Self Insurers' Management Group

SELF INSURORS' MANAGEMENT GROUP

APPLICATION FOR MEMBERSHIP

INDEMNITY AGREEMENT
AND POWER OF ATTORNEY

This Application and Agreement is made by and between each and every Member of the SELF INSURORS' MANAGEMENT GROUP, and by said ASSOCIATION itself, and is based upon the following understandings by the parties:

WHEREAS, the Members have organized and formed an ASSOCIATION which shall be known as SELF INSURORS' MANAGEMENT GROUP, herein referred to as the "Association," and

WHEREAS, the ASSOCIATION, on Behalf of its Members, will submit to the Workers' Compensation Court, an application to permit the Members to enter into an agreement to pool their respective liabilities under the Oklahoma Workers' Compensation Act, herein referred to as the "ACT," and

WHEREAS, the Rules of the Workers' Compensation Court require that each and every member of a group self-insurance association shall execute an indemnity agreement and power of attorney, and

WHEREAS, each Member of the ASSOCIATION has elected to become a party to this Agreement, to comply with conditions set forth herein and to establish a group self-insurance association pursuant to the provisions of the Workers' Compensation Act and the Rules of the Court, and to execute such instruments and take such

action as may be required to form and continue such ASSOCIATION.

NOW, THEREFORE, and for in consideration of the mutual covenants, promises and obligations contained in this AGREEMENT, which are given by the ASSOCIATION and by each and every Member to each other Member and are so accepted by each every Member and the ASSOCIATION, the parties hereto covenant and agree as follows:

1. The ASSOCIATION, through its BOARD OF DIRECTORS, herein referred to as "BOARD," shall collect all premiums and assessments owed by each and every Member when same is due or the ASSOCIATION shall promptly terminate the membership of any delinquent Member as provided by Court Rules and shall take all reasonable and necessary actions to collect such delinquent accounts from any terminated Member.

2. The ASSOCIATION shall acquire both specific and aggregate excess insurance in amounts required by the Court for the protection of its Members against catastrophic loss.

3. Each and every Members [sic] jointly and severally agrees to assume, pay and discharge any liability under the ACT of any and all members of the ASSOCIATION, and each Member agrees to pay any assessments as may be required by the BOARD.

4. Each and every member authorizes the BOARD to designate and appoint Chris Sturm as the Administrator who shall be empowered to accept service on behalf of the ASSOCIATION and its Members and shall have the

power of attorney of each and every Member in all transactions relating to or arising out of the operation of the ASSOCIATION. The BOARD, in its discretion, may at any time revoke the aforesaid powers of the Administrator and substitute another in his place.

5. Regardless of whether the Member terminates its membership in the ASSOCIATION voluntarily or whether such membership is either terminated by the ASSOCIATION or the Court, the above agreement to indemnify each and every other Member and the power of attorney shall continue in force and effect and shall remain completely unabated concerning any and all liabilities and obligations that the ASSOCIATION or its Members may incur under the ACT during any fiscal year in which the Member participates in the ASSOCIATION.

6. The Members intend this Agreement as a mutual covenant of assumption and not as a partnership, but if any court of competent jurisdiction shall construe it to be a partnership, then it is the intent of the parties that such partnership be limited in scope to the uses for which this Agreement is executed and for no other.

7. The ASSOCIATION and each and every Member agree with each other Member, including any future Members, to be bound by all of the terms and conditions of this Agreement, by the rules and regulations that may be adopted and approved by the BOARD and by the By-Laws of this ASSOCIATION.

8. The Members joint and severally covenant and agree that there shall be no disbursements out of funds of the ASSOCIATION by way of dividends or distribution of

claim reserves until after the provision has been made for all obligations of the ASSOCIATION under the ACT and except at the discretion of the BOARD upon application to and approval by the Court.

9. Any Member may terminate its membership in this ASSOCIATION by giving thirty (30) days written notice by certified mail return-receipt requested to the ASSOCIATION and to the Court. Termination of a Member's membership by the ASSOCIATION or by withdrawal of approval by the Court shall likewise be upon thirty (30) days written notice by certified mail return-receipt requested to the Member and to the Court.

10. The Members ratify and confirm the appointment by the BOARD of Claims Management Services as the Service Company for the ASSOCIATION and its Members, whereby Claims Management Services shall provide services under the ACT on behalf of its Members.

Member: Century Martial Arts Supply, Inc. By: /s/ L. Michael Olland

Date: 3-1-86 Title: C.E.O.

(Filed Apr. 31, 1986) Witness: /s/ Sumie Drunl

Title: Mgr. of Human Resources

Received and Accepted by the Board of Supervisors and Administrator of SELF INSURORS' MANAGEMENT GROUP.

President: /s/ Joe Rogers
Joe Rogers

Administrator:
/s/ Chris Sturm
Chris Sturm

Date: 3-1-86

Approved this 4th day of April, 1986 Workers' Compensation Court, State of Oklahoma

/s/ Michael Clingman
Michael Clingman

I do hereby certify that the above and foregoing is a true copy of the original Order now on file in this Office and that a certified copy hereof was by me mailed to the parties affected on the 3rd day of APR 1986

Witness my hand and the Official Seal of this Court on this date.

/s/ Robert L. Tharp

No. 97-1977

In The

Supreme Court of the United States

October Term, 1997

Supreme Court, U.S.
FILED
SEP 2 1998
OFFICE OF THE CLERK

THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, INC., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, INC., JOHN VANCE MOTORS, INC. and TROY WESTNIDGE, INC.,

Petitioners,

v.

SELF INSURERS' MANAGEMENT GROUP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITIONER COLBERT NURSING HOME, INC.'S REPLY TO RESPONDENT OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.'S BRIEF IN OPPOSITION

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REPLY BRIEF OF JOINT PETITIONER COLBERT NURSING HOME, INC.

The Oklahoma Supreme Court treated as companion cases for purposes of appeal both of the appeals that are the subject of the instant Joint Petition For Certiorari (the "Petition"). It is not clear to what extent the Oklahoma Supreme Court based its opinion in the YWCA et al. Petitioners case involving Self Insurer's Management Group, Inc. ("SIMG"), on the arguments made in the Colbert Nursing Home ("Colbert") Petitioner's case involving Oklahoma Employers Safety Group, S.I.A. ("OESG"). The Oklahoma Supreme Court found the fact and legal issues were similar. Petition App. 16 and 17. Inasmuch as the Oklahoma Supreme Court used the Briefs in SIMG to dispose of OESG's Oklahoma Securities Act claim (App. 19), reference was made in the Joint Petition to briefs filed in both cases. However, the Respondents filed separate responses to the Petition, and this Reply will address new points raised by OESG in its Response (the "Response").

PROPOSITION I: THE MCCARRAN-FERGUSON ACT SHOULD NOT APPLY TO NULLIFY FEDERAL SECURITIES LAWS

In "Proposition I" OESG incorrectly argues that the Petition must be denied for lack of jurisdiction because Petitioners failed to preserve the issues raised herein and the Oklahoma Supreme Court did not pass judgment on the federal questions now before this Court. Respondent

OESG misstates the facts. The Oklahoma Supreme Court erroneously determined that based on the McCarran-Ferguson Act, the Securities Act of 1933 did not apply to the facts in dispute. Petition App. at p. 21. This issue was briefed in the trial court. Response App. at p. 9-12; Petition App. 64-68; Response App. 51-53; and Petition App. 70-72, 76-77; as well as in the briefs in the companion SIMG case.

OESG also incorrectly claims Colbert never presented a rebuttal argument against the application of the McCarran-Ferguson Act and that the Petition is the first time Colbert ever argued that Colbert was not "engaged in the business of insurance". This is not true. See Petition App. 66 (" . . . Colbert is not an insurance company . . . "). Further, at the trial court level Colbert responded to OESG's arguments regarding the McCarran-Ferguson Act by pointing out that the contract involved was not just a contract for insurance, but for participation in an insurance company with ownership attributes such as dividends, assessments for deficits and voting rights, and is subject to securities laws. Petition App. 64-68 and 70-72 (along with other cites to record in the preceding paragraph). The trial court's ruling confirmed Colbert's position. The parties were not permitted to file briefs in the appeal to the Oklahoma Supreme Court. However, it is clear that these issues were raised and encompassed in the Oklahoma Supreme Court's decision. Petition App. 20-22. Colbert again raised these arguments in the Petition For Rehearing. Petition App. 76 and 78.

OESG also quotes the Oklahoma Supreme Court's incorrect statement that Colbert failed to cite any authority supporting its federal securities laws claims. In the

Petition For Rehearing Colbert corrected the Court on this point. Petition App. 76-77. Colbert addressed this in the Petition at p. 8, fn.2.

Further, Colbert argued at the trial court that the amendment to Title 85, Section 149.1.C demonstrates the applicability of the Oklahoma Securities Act (Title 71 Oklahoma Statutes § 1, et seq.), which amendment came into effect *after* Colbert had asserted its counterclaim and defenses under the Oklahoma Securities Act. Colbert asked the trial court to take judicial notice of the proceeding in the SIMG case in making its determination in the OESG case. Petition App. 58-59. Colbert also asserted in its Petition for Rehearing that the Oklahoma Supreme Court's ruling constituted an impermissible destruction of a defense that existed in favor of Colbert and is not permissible under the United States Constitution. Petition App. 76. The issue is properly before this Court for consideration.

OESG incorrectly argues in its Proposition II that the Petitioners are asking the Court to ignore the McCarran-Ferguson Act. Petitioners are asking the Court to simply determine which of two federal acts applies to the instant facts, the Securities Act of 1933 or the McCarran-Ferguson Act. The Oklahoma Supreme Court determined the McCarran-Ferguson Act with 85 O.S. § 149.1 applies, to the exclusion of the Securities Act of 1933, and Colbert asks this Court to review that decision. OESG failed to show in the trial court or Oklahoma Supreme Court how compliance with *both* the Securities Act of 1933 *and* state workers compensation laws (regarding formation of associations) will invalidate, impair or supersede that state law. OESG treats the instant contracts to participate in the

associations as if they were ordinary contracts of insurance, and adopt the position that the McCarran-Ferguson Act mandates that this state law and the Securities Act of 1933 cannot co-exist. However, *Securities & Exchange Commission v. Republic National Life Insurance*, 378 F.Supp. 430, 437 (S.D.N.Y. 1974), held that "*National Securities* indicates that the MFA is to be narrowly construed in the face of valid federal regulatory interests: accommodation of federal and state regulatory interests is to be sought."

OESG's statement that "Congress created the McCarran-Ferguson Act for the sole purpose of allowing the individual states to create and regulate entities such as self-insurance associations" is a gross misstatement of the purpose behind enactment of the Act. The primary concern of Congress was with the relationship between insurance *ratemaking* and the *antitrust* laws, and with the power of the states to tax insurance companies. *Securities & Exchange Commission v. National Securities*, 393 U.S. 453, 458-459, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1968). Insurance ratemaking, antitrust laws, and state taxation are not issues in this case.

PROPOSITION II: THE OKLAHOMA SUPREME COURT'S RETROACTIVE APPLICATION OF A LEGISLATIVE AMENDMENT RENDERING STATE SECURITIES LAWS INAPPLICABLE TO A GROUP SELF-INSURER ASSOCIATION DIVESTED PETITIONERS OF A VESTED RIGHT TO A DEFENSE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

OESG misinterpreted case law regarding Colbert's vested right to an existing defense by improperly suggesting that a defense is only vested if it has been heavily

litigated on those specific facts. Both *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, 464 P.2d 748, 755 (Okl. 1968) and *Resolution Trust Corporation v. Wright*, 868 F.Supp. 301, 304 (W.D.Okl. 1993), support Petitioner's position. Both cases state that a vested right may be created by either common law or statute. Colbert's vested right was created by the Oklahoma Legislature's enactment of the Oklahoma Securities Act. The Oklahoma Securities Act provides claims for relief and defenses to enforcement of contracts at 71 O.S. § 408(a) and (i). App. 42-44. *Resolution Trust Corporation* states that the accrual of a cause of action means the right to institute and maintain a suit, and whenever one person may sue another a cause of action has accrued which stands unaffected or lessened by legislative amendment. *Id.* at 304, 305. An accrued right may only be extinguished prospectively. *Id.* at 305. Thus, the Oklahoma Supreme Court improperly deprived Petitioner of a vested defense by retroactive application of the legislative amendment to 85 O.S. § 149.1.

Respectfully submitted,

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No. 97-1977

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In The

Supreme Court of the United States

October Term, 1997

THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, INC., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, INC., JOHN VANCE MOTORS, INC. and TROY WESTNIDGE, INC.,

Petitioners,

v.

SELF INSURERS' MANAGEMENT GROUP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

REPLY TO SELF INSURERS' MANAGEMENT GROUP'S BRIEF IN OPPOSITION

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September 2, 1998

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REPLY BRIEF OF JOINT PETITIONERS YWCA, ET AL.

REPLY TO STATEMENT OF THE CASE

The undersigned Petitioners are obliged to address several serious errors contained in the first three pages of the Brief of Self Insurer's Management ("SIMG") Brief in Opposition. The following errors are addressed, to-wit:

1. The Petitioners paid every dime of their insurance premiums. The Respondent's statements to the contrary are simply wrong. Respondent's Petition in the district court of Oklahoma County was a suit to hold Petitioners jointly and severally liable for over $2 million in financial deficits of the association. *See* Judgment in Petitioner's Appendix No. 26, to-wit:

> . . . Plaintiff's claims in its Petition, as amended March 31, 1994, seeking judgment against said Defendants in the amount of $2,500,000, both jointly and severally . . .

Hardly unpaid premiums.

2. On page 3 Respondent states "Simply stated, Petitioners are employers buying business insurance, not purchasers of securities." As indicated by the Record – *See* Appendix No. 47 and 48, & ¶ 3 through 7, the Petitioners thought they were buying business insurance and ended up as an "owner" of the Association, allegedly jointly and severally liable for millions of dollars. **A circumstance more in need of the financial disclosure requirements of securities laws and regulations is hard to imagine, especially given that this is a nation-wide problem.** *See* Petitioners' Joint Petition for Writ of Certiorari, pp. 3 and 4.

3. The Respondent erroneously interprets the Petitioner's statement as cited on page 2 of Respondent's opposition brief. The *sole* basis upon which the Oklahoma Supreme Court relied to deny protection of *federal* securities laws was the application of the McCarran-Ferguson Act. The Petitioners fully recognize the Oklahoma Supreme Court cited an additional reason for reversing the local District Court – they were also denied protection of the state securities laws. This improper retroactive application of subsequent Legislation was thoroughly reviewed in Proposition II, pp. 15-18, Petitioners' Joint Petition for Writ of Certiorari.

REPLY TO RESPONDENT'S "REASONS FOR DENYING THE WRIT"

Under sub-heading **1.a.** the Respondent *admits* that the 1933 Securities Act "exception" is limited to an insurance policy and "like contracts". These statements establish the *Petitioners'* position that the Securities Act of 1933 was intended to apply, since the "agreements" at issue resulted in the Petitioners becoming owners/shareholders of the insurance association, rather than simply purchasing an insurance policy.

Under sub-paragraph **1.b.**, the Respondent attempts to distinguish numerous authorities cited by the Petitioners which hold that a key element [to exempt the subject agreements from the protection of securities laws under the McCarran-Ferguson Act] is whether "**the practice is limited to entities within the insurance industry.**" Not only was the Respondent unable to cite any

authority to the contrary, these cases clearly establish that if the McCarran-Ferguson Act is to exempt the "subject agreements" from securities laws, the "agreements **must be limited to entities within the insurance industry**. *See Hartford Fire Insurance Co. v. California*, 509 U.S. 764 at 781, 113 S.Ct. 2891 at 2901, 125 L.Ed.2d 612 (1993); *Union Labor Life Insurance Co. v. Paranee*, 458 U.S. 119 at 129, 102 S.Ct. 3002 at 3008, 73 L.Ed.2d 647 (1982).

Clearly, no one can argue that the Petitioners herein were in the "business of insurance" and "entities within the insurance industry", i.e. the YWCA, a martial arts supply company, a restaurant, a sign company, etc. As held by the United States Supreme Court as early as 1969 in *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453 at 459, 89 S.Ct. 564 at 568 (1969); "the statute [McCarran-Ferguson Act] did not purport to make the state supreme in regulating all the activities insurance *companies*; its language refers not to the person or companies who are subject to state regulation, but to laws "regulating the *business* of insurance".

Applying this holding, the Petitioners may have thought they were purchasing insurance policies, but instead they became "owners" of an insurance association and allegedly jointly and severally liable for millions of dollars in financial deficits of the association. Laws designed to protect the "purchasers" of an ownership interest in an insurance association or company *are* the financial disclosure requirements of the Securities Acts.

THE "RETROACTIVE" LEGISLATIVE AMENDMENT

The Respondents attempt to justify the Oklahoma Supreme Court's retroactive application of a legislative amendment specifically exempting the "agreements" from the Oklahoma Securities Act. This law was passed *after* the Petitioners prevailed, in part, on that very basis in the District Court. The Respondent relies upon the language of the Oklahoma Supreme Court which states "we held that where a prior enactment is ambiguous, there is a presumption that subsequent legislatures amending the act was designed to clarify its text." The "ambiguity" is *imaginary*, as there was no previous language in the act that mentioned Oklahoma securities laws in any form. The "clarification" logic is misplaced, at best.

Further, the "highlight" of the Respondent's brief appears on page 13 as follows:

> "This highlights the Petitioners' failure to raise at trial court and properly preserve on appeal the issue of 'vested interest.' This failure to raise the issue precludes jurisdiction by the U.S. Supreme Court under its Rule 14(g)(i)."

It would take, indeed, a **crystal ball of considerable clarity** for the Petitioners herein to pre-conceive in the lower court that Respondents would run to the Oklahoma Legislature following their defeat in the district court and obtain a change in the law; and the Oklahoma Supreme Court would then retroactively apply this new "statutory exemption" from the Oklahoma Securities Act to the Petitioners' agreements. This issue was raised at the very *first* opportunity by Petitioners in their Oklahoma Supreme

Court Petition for Rehearing. *See* Petitioners' Appendix Nos. 80 through 84.

CONCLUSION

WHEREFORE, having replied to Respondent's arguments, including the *gross misstatement* that the Petitioners did not pay their insurance premiums; and having shown the necessity for application of **financial disclosure requirements** of both federal and local securities laws to this growing nationwide problem of small businesses becoming owners/shareholders of insurance associations, the Petitioners **HEREBY PRAY** that this Court address this issue. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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